

ALLIED PAPERS

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
SUFYIAN BARHOUMI

ALSO KNOWN AS:

ABU OBAIDA
UBAYDAH AL JAZA'IRI
SHAFIQ

No. 050006

VOLUME VI OF ____ TOTAL VOLUMES

2005 FEDERAL COURT LITIGATION - FILED BY
BARHOUMI'S COUNSEL, CASE NO. 05-CV-1506-RMC AT
U.S. DISTRICT COURT, (WASHINGTON D.C.)
(NO REDACTIONS OF COURT'S PUBLIC RECORDS)

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United States v. Sufyan Barhoumi, No. 050006

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at <http://www.defenselink.mil/news/commissions.html>.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript, Prosecution, Defense and Review Exhibits constitute the "record of trial," and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and *United States v. Castleman*, 10 M.J. 750, 751 (AFCMR 1981) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, *see* Clerk of Military Commission administrative materials in Volume III.

VOLUME
NUMBER

SUBSTANCE OF CONTENTS

ALLIED PAPERS Not part of "record of trial"

- | | |
|-----------------------|--|
| I¹ | Military Commission Primary References (Congressional Authorizations for Use of Force; Detainee Treatment Act; UCMJ articles; President's Military Order; Military Commission Orders; DoD Directive; Military Commission Instructions; Appointing Authority Regulations; Presiding Officer Memoranda—includes DoD rescinded publications) |
| II¹ | Supreme Court Decisions: <i>Rasul v. Bush</i>, 542 U.S. 466 (2004); <i>Johnson v. Eisentrager</i>, 339 U.S. 763 (1950); <i>In re Yamashita</i>, 327 U.S. 1 (1946); <i>Ex Parte Quirin</i>, 317 U.S. 1 (1942); <i>Ex Parte Milligan</i>, 71 U.S. 2 (1866) |

¹ **Interim volume numbers. Final numbers to be added when trial is completed**

United States v. Muhammad, No. 050009

INDEX OF VOLUMES

<u>VOLUME NUMBER</u>	<u>SUBSTANCE OF CONTENTS</u>
III²	DoD Decisions on Commissions including Appointing Authority orders and decisions, Chief Clerk of Commissions documents
IV²	Federal Litigation in <i>Hamdan v. Rumsfeld</i>, at U.S. Supreme Court and D.C. Circuit
V²	Federal Litigation at U.S. District Courts Not Filed by Counsel in <i>United States v. Barhoumi</i>
VI²	Selected 2005 filings and U.S. District Court decisions in <i>United States v. Barhoumi</i>
VII²	Selected 2006 filings and U.S. District Court decisions in <i>United States v. Barhoumi</i>

RECORD OF TRIAL

VIII²	Transcript R. 1-218 (Mar. 2 and Apr. 26, 2006 sessions)
IX²	Review Exhibits 1-47 (Mar. 2 and Apr. 6, 2006 sessions)

² Interim volume numbers. Final numbers to be added when trial is completed

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
1	Petitioners Petition for Writ of Habeas Corpus, (July 28, 2005) (44 pages)	<u>1</u>
	Petition for Writ of Habeas Corpus	<u>2</u>
	Section 1—Jurisdiction and Venue	<u>3</u>
	Section 2—Parties	<u>4</u>
	Section 3—Statement of Facts	<u>5</u>
	3(A)—Facts asserted concerning petitioner Shafiiq based on information and belief	<u>5</u>
	3(B)—The Joint Resolution “Authorization for Use of Military Force”	<u>8</u>
	3(C)—Military Order No. 1	<u>9</u>
	3(D)—Petitioner Shaffiiq’s continued detention violates 2(A) of the Military Order	<u>11</u>
	3(E)—The conditions of detention at Guantanamo violates Section 3(B) of the Military Order	<u>12</u>
	3(F)—Rendition of prisoners or the threat thereof violates the Military Order and is ultra vires and unlawful	<u>20</u>
	3(G)—The conditions of detention at Guantanamo, including rendition violate H.R. 1268	<u>21</u>
	Section 4—Causes of Action—17 Claims for Relief	<u>24</u>

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
	Section 5—Prayer for Relief	<u>39</u>
	Detainee’s Authorization and Notification	<u>43</u>
2	Notice of Court (July 28, 2005) (1 page)	<u>45</u>
4-1	RESPONDENTS' MOTION FOR ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR LACK OF PROPER "NEXT FRIEND" STANDING OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS PENDING RELATED APPEALS AND FOR CONTINUED COORDINATION (Aug. 31, 2005) (23 pages)	<u>46</u>
	ARGUMENT	<u>51</u>
	1. Petitioners should establish proper “Next Friend” Standing or the above-captioned cases should be dismissed	<u>51</u>
	2. If the Court does not dismiss the above-captioned cases they should be stayed pending resolution of the appeals decisions in the other Guantanamo Detainee Case adjudicating common issues	<u>60</u>
	CONCLUSION	<u>67</u>
4-2	Declaration of Richard A. Gregg (Aug. 19, 2005) (2 page)	<u>69</u>
4-3	Declaration of Frank Sweigart (Aug. 31, 2005) (3 pages)	<u>71</u>
	Exhibit A—CSRT Notification	<u>74</u>
	Exhibit B—CSRT Determination Notification	<u>75</u>
	Exhibit C—Habeas Notification	<u>76</u>
	Exhibit D—Declaration of 1LT Brown, Mar. 17, 2005	<u>77</u>

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
	Exhibit E—Habeas Notification	<u>85</u>
4-4	AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS TO DETAINEES AT THE UNITED STATES NAVAL BASE IN GUANTANAMO BAY, CUBA (Nov. 8, 2004) Signed by Judge Green (Order is 15 pages—Total is 31 pages)	<u>87</u>
	Exhibit A—Revised procedures for Counsel access to Detainees at the U.S. Naval Base in Guantanamo Bay, Cuba	<u>103</u>
	Exhibit B—Memorandum of Understanding Regarding Access to Classified National Security Information	<u>113</u>
	Exhibit C—Acknowledgement	<u>116</u>
	Exhibit D—Order Supplementing and Amending Filing Procedures contained in November 8, 2004, Amended Protective Order, Signed by Judge Green (Dec. 13, 2004)	<u>117</u>
4-5	Order Supplementing and Amending Filing Procedures contained in November 8, 2004, Amended Protective Order, Signed by Judge Green (Dec. 13, 2004)	<u>118</u>
4-6	Order Addressing Designation Procedures For “Protective Information” Signed by Judge Green (Nov. 10, 2004)	<u>122</u>
4-7	Proposed Order to Show Cause on “Next Friend” Status	<u>124</u>
5-1	Petitioners Opposition to Order to Show Cause, and Request for Status Hearing (12 Sep 05) (13 pages)	<u>125</u>
	ARGUMENT	<u>127</u>

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
	I. RESPONDENTS' MOTION FOR ORDER TO SHOW CAUSE SHOULD BE DENIED AND INSTEAD THE COURT SHOULD SCHEDULE A STATUS CONFERENCE TO ENSURE THAT MR. SHAFIIQ MAY PROMPTLY CONSULT WITH COUNSEL	<u>127</u>
	2. RESPONDENTS' ALTERNATIVE MOTION FOR STAY SHOULD BE DENIED BECAUSE THE CLAIMS ASSERTED BY MR. SHAFIIQ HAVE NOT BEEN ADDRESSED BY ANY DISTRICT COURT AND ARE NOT BEFORE ANY APPELLATE COURT	<u>131</u>
	Exhibit 1—Declaration by Barbara Olshansky (Sept 9, 2005)	<u>138</u>
	Exhibit A—Letter from Mr. Fogel to Secretary Rumsfeld, July 1, 2004	<u>148</u>
	Exhibit B—Letter from Mr. Fogel to Secretary England, July 14, 2004	<u>149</u>
	Exhibit C—Letter from Mr. Mora to Mr. Fogel, July 20, 2004	<u>152</u>
	Exhibit D—Letter from Shayana Kadidal to the DoD Deputy General Counsel, Sept. 16, 2004	<u>154</u>
	Exhibit E—Letter from DoD Deputy General Counsel to Mr. Kadidal, Nov. 3, 2004	<u>156</u>
	Exhibit F—Letter from Barbara Olshansky to Secretary England, Dec. 17, 2004	<u>158</u>
	Exhibit G—Letter from Mr. Boyle, DoJ to Barbara Olshansky, Jan. 14, 2005	<u>164</u>

7-1 RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
	ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR LACK OF PROPER "NEXT FRIEND" STANDING OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS PENDING RELATED APPEALS (Sept. 22, 2005) (18 pages)	<u>167</u>
	[7-1 to 7-3 and 8-1 to 8-3 are the same documents]	
	ARGUMENT	<u>171</u>
	I. Petitioners Have Failed to Establish Proper "Next Friend" Standing in the Above-Captioned Cases	<u>171</u>
	2. If the Court Does Not Dismiss the Above-Captioned Cases, They Should be Stayed Pending Resolution of the Appeals of Decisions in the Other Guantanamo Detainee Cases Adjudicating Common Issues	<u>179</u>
	CONCLUSION	<u>183</u>
	Second Declaration of Frank Sweigart (Sept 19, 2005) (16 pages)	<u>185</u>
	Exhibit A—CSRT Notification	<u>188</u>
	Exhibit B—CSRT Determination Notification	<u>189</u>
	Exhibit C—Habeas Notification	<u>190</u>
	Exhibit D—Declaration of 1LT Brown, Mar. 17, 2005	<u>191</u>
	Exhibit E—Habeas Notification	<u>199</u>
7-3	DECLARATION OF ESTEBAN RODRIGUEZ, May 5, 2005	<u>201</u>
24	FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS	<u>205</u>

**SELECTED FILINGS IN U.S. DISTRICT COURT, AND DECISIONS
OF U.S. DISTRICT COURT IN 2005**

DISTRICT

COURT #	DESCRIPTION	PAGE #
	SECTION I—JURISDICTION AND VENUE	<u>207</u>
	SECTION II—PARTIES	<u>208</u>
	SECTION III—STATEMENT OF FACTS	<u>209</u>
	(A) FACTS ASSERTED CONCERNING PETITIONER BARHOUMI BASED ON INFORMATION AND BELIEF	<u>209</u>
	(B) THE JOINT RESOLUTION ("AUTHORIZATION FOR USE OF MILITARY FORCE")	<u>212</u>
	(C) MILITARY ORDER NO. 1	<u>213</u>
	(D) PETITIONER BARHOUMI'S CONTINUED DETENTION VIOLATES Sec. 2(A) OF THE MILITARY ORDER	<u>215</u>
	(E) THE CONDITIONS OF DETENTION AT GUANTANAMO VIOLATE SEC. 3(B) OF THE MILITARY ORDER	<u>217</u>
	(F) RENDITION OF PRISONERS OR THE THREAT THEREOF VIOLATES THE MILITARY ORDER AND IS ULTRA VIRES AND UNLAWFUL	<u>224</u>
	(G) THE CONDITION OF DETENTION AT GUANTANAMO, INCLUDING THE THREAT OF RENDITION VIOLATE H .R. 1268	<u>225</u>
	(H) THE MILITARY COMMISSION	<u>228</u>
	SECTION IV CAUSES OF ACTION (25 Claims for Relief)	<u>234</u>
	SECTION V PRAYER FOR RELIEF	<u>270</u>
	Barhoumi's Charge Sheet for Military Commission	<u>276</u>

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIIQ (LAST NAME UNKNOWN),)
 Detainee,)
 Guantánamo Bay Naval Station)
 Guantánamo Bay, Cuba;)

JAMAAL KIYEMBA,)
 as Next Friend of SHAFIIQ (LAST)
 NAME UNKNOWN);)

Petitioners/Plaintiffs,)

v.)

GEORGE W. BUSH,)
 President of the United States)
 The White House)
 1600 Pennsylvania Ave., N.W.)
 Washington, D.C. 20500;)

CIVIL ACTION NO.

DONALD RUMSFELD,)
 Secretary, United States)
 Department of Defense)
 1000 Defense Pentagon)
 Washington, D.C. 20301-1000;)

ARMY BRIG. GEN. JAY HOOD,)
 Commander, Joint Task Force - GTMO)
 JTF-GTMO)
 APO AE 09360; and)

ARMY COL. MIKE BUMGARNER,)
 Commander, Joint Detention)
 Operations Group - JTF-GTMO,)
 JTF-GTMO)
 APO AE 09360,)

Respondents/Defendants.)

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Shafiiq (Last Name Unknown) (“Shafiiq”) seeks a Writ of Habeas Corpus. A citizen of Algeria, he acts on his own behalf and through his Next Friend, Jamaal Kiyemba, his co-detainee and friend. He is a civilian wrongly classified as an “enemy combatant” by the President of the United States, and is being held virtually incommunicado in military custody at the United States Naval Station at Guantánamo Bay, Cuba (“Guantánamo Bay”), without basis, without charge, without access to counsel, and without being afforded any fair process by which he might challenge his detention. Petitioner Shafiiq is being held by color and authority of the Executive, and in violation of the Constitution, laws and treaties of the United States as well as customary international law. Accordingly, this Court should issue a Writ of Habeas Corpus compelling Respondents either to release Petitioner Shafiiq or to establish in this Court a lawful basis for Petitioner Shafiiq’s detention and provide related injunctive and declaratory relief.

Pursuant to the President’s authority as Commander-in-Chief, his authority under the laws and usages of war, or under the November 13, 2001 Military Order, Respondents George W. Bush, President of the United States, Donald H. Rumsfeld, U.S. Secretary of Defense, Army Brigadier General Jay Hood, Commander of Joint Task Force-GTMO, and Army Colonel Mike Bumgarner, Commander, Joint Detention Operations Group, Joint Task Force-GTMO, are either ultimately responsible for or have been charged with the responsibility of maintaining the custody and control of the detained Petitioner at Guantánamo Bay.

SECTION I
JURISDICTION AND VENUE

1. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §§ 2241(c)(1), (c)(3) and 2242. Petitioners further invoke this Court's jurisdiction under: 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; 5 U.S.C. § 702; Articles I and II of the United States Constitution; and the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Petitioners also rely on Rule 57, Fed.R.Civ.P.

2. This Court is empowered under 28 U.S.C. § 2241 to grant this Writ of Habeas Corpus, and to entertain the Petition filed by Jamaal Kiyemba, the Next Friend of Petitioner Shafiq, under 28 U.S.C. § 2242.

3. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdiction, and to issue all writs necessary or appropriate in aid of its jurisdiction by 28 U.S.C. § 1651.

4. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391 because at least one of the respondents resides in the District, a substantial part of the events giving rise to the claim occurred in the District, at least one respondent may be found in the District, and all respondents are either officers or employees of the United States, or agencies thereof, and acting in their official capacities.

SECTION II
PARTIES

5. Petitioner Shafiiq is an Algerian citizen who is presently incarcerated at Guantánamo Bay and held in Respondents' unlawful custody and control. *See* attached Affidavit of Jamaal Kiyemba at ¶1.

6. Petitioner Jamaal Kiyemba is Petitioner Shafiiq's co-detainee and friend. *Id.* at ¶1 and attachment. He is an Algerian citizen. Because his co-detainee and friend has been denied access to legal counsel and to the courts of the United States, Jamaal Kiyemba acts as his Next Friend, per 28 U.S.C. §§ 2241 and 2242. *Id.* at ¶1.

7. Respondent George W. Bush is the President of the United States and Commander-in-Chief of the United States Military. Petitioner Shafiiq is being detained pursuant to President Bush's authority as Commander-in-Chief, under the laws and usages of war or, alternatively, pursuant to the Military Order of November 13, 2001: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (November 13, 2001) ("Military Order"). President Bush is responsible for Petitioner Shafiiq's unlawful detention and is sued in his official capacity.

8. Respondent Donald Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to the President's authority as Commander-in-Chief, under the laws and usages of war or, alternatively, pursuant to Sec. 3 of the Military Order, Respondent Rumsfeld has been charged with the responsibility of maintaining the custody and control of Petitioner Shafiiq. He is sued in his official capacity.

9. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force - GTMO, the task force running the detention operation at Guantánamo Bay. He has supervisory responsibility for Petitioner Shafiiq and is sued in his official capacity.

10. Respondent Army Colonel Mike Bumgarner is the Commander of the Joint Detention Operations Group and the Joint Task Force - GTMO detention camps, including the U.S. facility where Petitioner Shafiiq is presently held. He is the immediate custodian responsible for Petitioner Shafiiq's detention and is sued in his official capacity.

11. Respondents are directly responsible for any activities undertaken by or under the supervision of any agents or employees acting on their behalf, or of agents or employees of private contractors ("contractor employees") with whom any agency under Respondents' authority or supervision has contracted for the provision of services at Guantánamo Bay. All references to Respondents' actions in this Petition include activities performed by Respondents' agents or employees, other government agents or employees or contractor employees.

SECTION III **STATEMENT OF FACTS**

§ III(A). FACTS ASSERTED CONCERNING PETITIONER SHAFIIQ **BASED ON INFORMATION AND BELIEF**

12. Petitioner Shafiiq has been and continues to be detained in U.S. custody at the U.S. Naval Base at Guantánamo Bay.

13. Guantánamo Bay is a territory over which the United States exercises exclusive jurisdiction and control.

14. Upon information and belief, Petitioner Shafiiq desires to pursue in United States courts every available legal challenge to the lawfulness of his detention. Petitioner Shafiiq has been denied access to counsel by Respondents, accordingly, this and subsequent allegations of fact that pertain to Petitioner Shafiiq are based on information and belief.

15. Petitioner Shafiiq is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind under any definition adopted by the government in any civil or military proceeding.

16. Petitioner Shafiiq has never been engaged in any combat against the United States and was never part of any forces hostile to the United States.

17. Petitioner Shafiiq is not, nor has he ever been, an individual who was part of or supporting Taliban forces or partners.

18. Petitioner Shafiiq is not, nor has he ever been, an individual who was part of or supporting the al Qaeda organization or its partners (a/k/a al Qaida).

19. Petitioner Shafiiq has not committed a belligerent act nor directly supported hostilities in aid of enemy forces against the United States.

20. Petitioner Shafiiq has not caused or attempted to cause any harm to American personnel or property prior to his detention or espouse any violent act against any American person or property.

21. Petitioner Shafiiq has not engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

22. Petitioner Shafiiq has not knowingly harbored one or more individuals who is or were a member of the al Qaeda organization.

23. Petitioner Shafiiq has not knowingly harbored one or more individuals who were engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

24. Petitioner Shafiiq has not been afforded any procedures that would satisfy his rights under the most fundamental common law notions of due process, the U.S. Constitution, the laws and treaties of the United States, or customary international law.

25. Petitioner Shafiiq is not, nor has he ever been, an “enemy combatant” who was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (June 28, 2004) (internal quotations omitted).

26. Petitioner Shafiiq is not, nor has he ever been, an “enemy combatant” as that term is used pursuant to the 7 July 2004 Order of Deputy Secretary of Defense Paul Wolfowitz, establishing the Combatant Status Review Tribunals.

27. Petitioner Shafiiq seeks to enforce his right to a judicial determination by an appropriate and lawful authority that there is a factual and legal basis for Respondents’ determination that he is either an “enemy combatant” as defined by the United States Supreme Court in *Hamdi* or an “enemy combatant” as that term is defined and used by the Executive in the Combatant Status Review Tribunals.

28. Petitioner Shafiiq is entitled to test the legality of his continued detention at Guantánamo Bay in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

29. There is no interest of the United States that is served by further detention of Petitioner Shafiiq at Guantánamo Bay.

§ III (B). THE JOINT RESOLUTION
("AUTHORIZATION FOR USE OF MILITARY FORCE")

30. In the wake of the September 11, 2001 attacks on the United States, the United States, at the direction of President Bush, began a military campaign against the Taliban government, then in power in Afghanistan.

31. On September 18, 2001, Congress passed and the President signed a joint resolution, the "Authorization for Use of Military Force" (the "AUMF"). The AUMF authorized the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Joint Resolution" a/k/a the "AUMF").

32. Prior to his detention at Guantánamo Bay, Petitioner Shafiiq did not plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

33. Prior to his detention at Guantánamo Bay, Petitioner Shafiiq did not belong to an organization that did plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

34. Prior to his detention at Guantánamo Bay, Petitioner Shafiiq did not harbor any organization or person who did plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

35. Petitioner Shafiiq is, therefore, not properly detained pursuant to President Bush's authority as Commander-in-Chief under the Joint Resolution.

§ III (C). MILITARY ORDER NO. 1.

36. On November 13, 2001, Respondent Bush issued Military Order No. 1. *See* Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Military Order").

37. The Military Order authorizes Respondent Rumsfeld, *inter alia*, to detain indefinitely "any individual who is not a United States citizen with respect to whom [Respondent Bush] determine[s] from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
 - i. is or was a member of the organization known as al Qaida;
 - ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - iii. has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.

Military Order, §2(a).

38. The Military Order requires that "[Respondent Rumsfeld] shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3" Military Order, § 2(b).

39. The Military Order requires that “[a]ny individual subject to this order shall be ... (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria” Military Order, § 3(b).

40. The Military Order exceeds the Executive’s authority under Article II of the United States Constitution and is *ultra vires* and void on its face.

41. The Military Order was neither authorized nor directed by Congress, and is, therefore, beyond the scope of the Joint Resolution of September 18, 2001.

42. The Military Order purports to vest President Bush with the sole discretion to identify individuals who fall within its purview. *See id.*, § 2(a).

43. The Military Order establishes no standards governing the exercise of President Bush’s discretion to identify individuals who fall within its purview.

44. The Military Order contains no provision for an individual who has been detained to be notified of the charges he may face.

45. The Military Order contains no provision for an individual who has been detained to be notified of his rights under domestic and international law, and provides neither the right to counsel, nor the rights to notice of consular protection or to consular access at the detainee’s request.

46. The Military Order provides no right for an individual who has been detained to appear before a neutral tribunal to review the legality of a detainee’s continued detention, contains no provision for recourse to an Article III court, and, moreover, expressly bars review by (i) any court of the United States, (ii) any court of any foreign nation, or (iii) any international tribunal. *See id.*, § 7(b)(2).

47. The Military Order authorizes detainees to be confined indefinitely without charges.

48. The Military Order authorizes indefinite and unreviewable detention, based on nothing more than the President Bush's written determination that an individual is subject to its terms.

49. The Military Order was promulgated in the United States and in this judicial district; the decision to detain Petitioner Shafiiq was made by Respondents in the United States and in this judicial district; the decision to detain Petitioner Shafiiq at Guantánamo was made in the United States and in this judicial district; and the decision to continue detaining Petitioner Shafiiq was, and continues to be, made by Respondents in the United States and in this judicial district.

50. Petitioner Shafiiq has not been, and is not being, detained lawfully either pursuant to the Military Order, President Bush's authority as Commander-in-Chief and/or under the laws and usages of war.

§ III (D). PETITIONER SHAFIIQ'S CONTINUED DETENTION
VIOLATES § 2(A) OF THE MILITARY ORDER

51. To the extent the Military Order is not facially *ultra vires*, the detention of Petitioner Shafiiq continues in violation of the express provisions of the Military Order.

52. Petitioner Shafiiq is not properly subject to the Military Order. No writing otherwise required by the Military Order was issued as to Petitioner Shafiiq.

53. Petitioner Shafiiq has not been, and is not being, detained lawfully pursuant to the Military Order.

54. Petitioner Shafiiq is not, nor has he ever been, an individual who was a member of the organization known as al Qaeda.

55. Petitioner Shafiiq has not engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

56. Petitioner Shafiiq has not knowingly harbored one or more individuals who is or were a member of the al Qaeda organization.

57. Petitioner Shafiiq has not knowingly harbored one or more individuals who were engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

58. There is no interest of the United States that is served by further detention of Petitioner Shafiiq at Guantánamo Bay.

59. Petitioner Shafiiq is entitled to test the legality of his continued detention under circumstances that violate Section 2(a) of the Military Order in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

**§ III (E). THE CONDITIONS OF DETENTION AT GUANTÁNAMO
VIOLATE § 3(B) OF THE MILITARY ORDER**

60. Upon information and belief, Petitioner Shafiiq is not being treated humanely as required by the Military Order, § 3(b).

61. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantánamo Bay, Cuba.

62. In April 2002, all prisoners at Guantánamo Bay were transferred to Camp Delta, a more permanent prison facility at Guantánamo Bay.

63. Certain prisoners at Guantánamo Bay are housed in Camp Delta and Camp Five, an additional maximum-security interrogation and detention center.

64. The United States military transferred Petitioner Shafiiq to Guantánamo Bay, where he has been held ever since, in the custody and control of Respondents.

65. Since gaining control of Petitioner Shafiiq, the United States military has held him virtually *incommunicado*.

66. Upon information and belief, Petitioner Shafiiq has been or will be forced to provide involuntary statements to Respondents' agents, employees, and/or contract employees at Guantánamo Bay.

67. Upon information and belief, Petitioner Shafiiq has been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, and the Central Intelligence Agency, though he has not been charged with an offense and has not been notified of any pending or contemplated charges.

68. Upon information and belief, Petitioner Shafiiq has not appeared before a lawful military or civilian tribunal, and has not been provided access to counsel or the means to contact and secure counsel.

69. Upon information and belief, Petitioner Shafiiq has not been adequately informed of his rights under the United States Constitution, the regulations of the

United States Military, the Geneva Conventions, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, the 1954 Convention Relating to the Status of Refugees or customary international law. Indeed, Respondents have taken the position that Petitioner Shafiiq should not be informed of these rights. As a result, Petitioner Shafiiq lacks any ability to protect or to vindicate his rights under domestic and international law.

70. Upon information and belief, Petitioner Shafiiq has been treated inhumanely and held under conditions that violate his constitutional and international rights to dignity and freedom from torture and from cruel, inhumane and degrading treatment or punishment. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 83-115, Ch.12-13, AMR 51/063/2005 (13 May 2005);
- (b) Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by US Forces," Ch.3 (2005)
- (c) United Nations, Press Release, "United Nations Human Rights Experts Express Continued Concern About Situation of Guantánamo Bay Detainees," Feb. 4, 2005;
- (d) International Committee of the Red Cross, Press Release, "The ICRC's Work at Guantánamo Bay," Nov. 30, 2004;
- (e) International Committee of the Red Cross, Operational Update, "US Detention Related to the Events of September 11, 2001 and Its Aftermath - the Role of the ICRC," July 26, 2004;
- (f) Amnesty International, *United States of America: Human Dignity Denied: Torture and Accountability in the 'War on Terror'*, at 22 (Oct. 27, 2004)(available at <http://web.amnesty.org/library/Index/ENGAMR.511452004>); *see also*
- (g) Barry C. Scheck, *Abuse of Detainees at Guantánamo Bay*, The Nat'l Assoc. of Criminal Defense Lawyers' Champion, Nov. 2004, at 4-5.

71. Many of the violations reported in the sources in the preceding paragraph – which include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror – were interrogation techniques approved for use at Guantánamo by the most senior Department of Defense lawyer. *See, e.g.:*

- (a) Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Nov. 27, 2002);
- (b) *Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, at 62-65 (Apr. 4, 2003).^a

72. In a confidential report to the United States government, the ICRC charged the U.S. military with intentional use of psychological and physical coercion on prisoners at Guantánamo Bay during interrogations that is “tantamount to torture.” *See, e.g.:*

- (a) Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo,” *New York Times*, Nov. 30, 2004, at A1 (including claims that doctors and other medical workers at Guantánamo Bay participated in planning for interrogations); *see also*
- (b) M. Gregg Bloche and Jonathan H. Marks, “When Doctors Go to War,” *New England Journal of Medicine*, Jan. 6, 2005, at 3-4.

^a Additional details of the cruel and degrading conditions suffered by detainees at Guantánamo Bay are set out at length in a statement by numerous released British detainees. *See* Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement: Detention in Afghanistan and Guantánamo Bay*, 300, at <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>. The Department of Defense also informed the Associated Press that a number of interrogators at Guantánamo Bay have been demoted or reprimanded after investigations into accusations of abuse at the facility. *See Report Details Guantánamo Abuses*, Assoc. Press, Nov. 4, 2004.

73. Since details of the ICRC's report emerged, new revelations of abuse and torture at Guantánamo Bay have appeared, including FBI memos detailing torture and "highly aggressive interrogation techniques" including 24-plus hour interrogations involving temperature extremes, dogs, prolonged isolation, and loud music. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 83-115, Ch.12-13, AMR 51/063/2005 (13 May 2005);
- (b) Amnesty International, "Guantánamo: An Icon of Lawlessness," Jan. 6, 2005, at 3-5; *see also*
- (c) Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by US Forces," Ch.3 (2005);
- (d) Neil A. Lewis, "Fresh Details Emerge on Harsh Methods at Guantánamo," *New York Times*, Jan. 1, 2005, at A11;
- (e) Carol D. Leonnig, "Further Detainee Abuse Alleged; Guantánamo Prison Cited in FBI Memos," *Washington Post*, Dec. 26, 2004, at A1;
- (f) Neil A. Lewis and David Johnston, "New F.B.I. Memos Describe Abuses of Iraq Inmates," *New York Times*, Dec. 21, 2004, at A1;
- (g) Dan Eggen and R. Jeffrey Smith, "FBI Agents Allege Abuse of Detainees at Guantánamo Bay," *Washington Post*, Dec. 21, 2004, at A1;
- (h) Neil A. Lewis, "F.B.I. Memos Criticized Practices at Guantánamo," *New York Times*, Dec. 7, 2004, at A19.

74. Even more recently, the Associated Press has reported allegations that female Guantánamo interrogators have used sexual taunting, including smearing fake menstrual blood on a detainee's face, to try to break Muslim detainees. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 89-90, Ch.12, AMR 51/063/2005 (13 May 2005);
- (b) Associated Press, *Gitmo Soldier Details Sexual Tactics*, Jan. 27, 2005;

75. The unlawful and unconstitutional interrogation techniques used by Respondents at Guantánamo include not only physical and psychological abuse, but also other impermissible conduct contrary to due process requirements, including, upon information and belief, having agents of the Government present themselves as lawyers for the detainees during meetings with the detainees, for the purpose of extracting information from the detainees. *See, e.g.*: Sam Hannel, “Lawyers Describe Guantánamo Detainees,” *Seattle Post-Intelligencer*, Jan. 19, 2005.

76. Respondents, acting individually or through their agents, have stated that whatever limitations apply on coercive interrogation techniques used by U.S. military officials under the auspices of the Department of Defense *do not apply* to interrogations conducted by agents of the CIA or other entities under President Bush. *See, e.g.*:

- (a) Eric Lichtblau, “Gonzales Says ’02 Policy on Detainees Doesn’t Bind CIA,” *New York Times*, Jan. 19, 2005, at A17;
- (b) Dan Eggen and Charles Babington, “Torture by U.S. Personnel Illegal, Gonzales Tells Senate,” *Washington Post*, Jan. 18, 2005, at A4; and
- (c) Amnesty International, “Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power,” at 27-43, Ch.5, AMR 51/063/2005 (13 May 2005).

77. In published statements, President Bush and Secretary Rumsfeld, and predecessors of Hood and Bumgarner, respectively, Brigadier General Michael Lenhert and Army Colonel Terry Carrico, have proclaimed that the United States may hold the detainees under their current conditions indefinitely. *See, e.g.*,

- (a) Roland Watson, *The Times* (London), Jan. 18, 2002 (“Donald Rumsfeld, the U.S. Defense Secretary, suggested last night that Al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them.”);

- (b) Lynne Sladky, Assoc. Press, Jan. 22, 2002 (“Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held ‘We have to look at Camp X-ray as a work in progress ...’ Lehnert told CNN. Lehnert said plans are to build a more permanent prison ‘exactly in accordance with federal prison standards’”);
- (c) John Mintz, “Extended Detention in Cuba Mulled,” *The Washington Post*, February 13, 2002 (“As the Bush Administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say they envision the naval base at Guantánamo Bay, Cuba, as a site for the tribunals and as a terrorist penal colony for many years to come.”).

78. According to the Department of Defense, even detainees who are adjudged not guilty of all charges by a military commission may nevertheless be kept in detention at Guantánamo Bay indefinitely. *See* Department of Defense Press Background Briefing of July 3, 2003, at <http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html> (last visited Jun. 4, 2005).

79. Counsel for Respondents have also consistently maintained that the United States has reserved the right to hold the detained Petitioners under their current conditions indefinitely. *See, e.g.:*

- (a) *In re Guantánamo Detainee Cases*, Nos. 02-CV-0299 (CKK), *et al.*, (D.D.C.), Tr. of Dec. 1, 2004 Or. Argument on Mot. to Dismiss at 22-24, statements of Principle Deputy Associate Att’y Gen. Brian Boyle; *see also*
- (b) Dana Priest, “Long-Term Plan Sought for Terror Suspects,” *Wash. Post*, Jan. 2, 2005, at A1.

80. Moreover, the Government has recently acknowledged plans to begin constructing a new, more permanent facility at Guantánamo Bay. *See, e.g.:*

- (a) Christopher Cooper, “In Guantánamo, Prisoners Languish in a Sea of Red Tape,” *Wall Street Journal*, Jan. 26, 2005, at A1;

- (b) Associated Press, "Guantánamo Takes on the Look of Permanency," Jan. 9, 2005.

81. Petitioner Shafiiq is entitled to test the legality of his continued detention under circumstances that violate Section 3(b) of the Military Order in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

82. These and other acts violate the first clause of Section 3(b) of the Military Order. Petitioner Shafiiq has suffered discriminatory treatment in violation of the second clause of Section 3(b) of the Military Order. This discriminatory and illegal treatment resulted from abuse of the Koran by agents of Respondents and other inhumane treatment aimed at the religious beliefs of Petitioner Shafiiq. *See, e.g.*:

- (a) Statement by Pentagon Spokesman Mr. Lawrence Di Rita on BG Hood Inquiry, No. 557-05, June 3, 2005;
- (b) U.S. Southern Command Press Release, "Hood Completes Koran Inquiry," June 3, 2005;
- (c) Carol Leonnig and Dana Priest, "Detainees Accuse Female Interrogators," Washington Post, at A01, Feb. 10, 2005.

83. Petitioner Shafiiq has otherwise suffered discriminatory inhumane treatment based on his country or origin, nationality, and religion. Respondents have released nearly 100 percent of detainees who were citizens of Australia or most European countries, regardless of their circumstances of capture or alleged terrorists activities. *See, e.g.*, Department of Defense Press Release, dated March 7 and 12, 2005 (Nos. 236-05 and 249-05). Only a small fraction of detainees from other regions of the world have been released. No Algerians are believed to have been released. *See id.*

This discriminatory treatment violates the second clause of Military Order Section 3(b) and further constitutes inhumane treatment in violation of that order.

**§ III (F). RENDITION OF PRISONERS OR THE THREAT THEREOF
VIOLATES THE MILITARY ORDER AND IS *ULTRA VIRES* AND UNLAWFUL**

84. Upon information and belief, Petitioner Shafiiq is subject to extraordinary rendition to a government who condones torture or the threat thereof.

85. During interrogations, detainees have been threatened with rendition or transfer to countries that routinely practice torture. Upon information and belief, the United States has secretly transferred detainees to such countries without complying with the applicable legal requirements for extradition. This practice, known as “rendition” or “extraordinary rendition,” is used to facilitate interrogation by subjecting detainees to torture. *See e.g.*:

- (a) Amnesty International, “Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power,” at 130-36, Ch.15, AMR 51/063/2005 (13 May 2005); and
- (b) Jane Mayer, “Outsourcing Torture: The Secret History of American’s “Extraordinary Rendition” Program, *The New Yorker*, Feb. 14, 2005, at 106.

86. The U.S. government’s practice of rendition has been well documented by various major American and international news organizations, including, *inter alia*, the *Washington Post*, *The Los Angeles Times*, and the British Broadcasting Corporation (the “BBC”). According to new accounts,

Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence source. The suspects have been taken to countries, . . . whose intelligence services

have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogations, the sources said.

Rajiv Chanrasekaran & Peter Finn, “U.S. Behind Secret Transfer of Terror Suspects,” *Wash. Post*, March 11, 2002, at A1; *see also* Dana Priest, “Long Term Plan Sought for Terror Suspects,” *Wash. Post*, Jan 2, 2005, at A1 (“The transfers, called ‘renditions,’ depend on arrangements between the United States and other countries, such as Egypt . . . , and agree to have local security services hold certain suspects in their facilities for interrogation by CIA and foreign liaison officers.”);

87. The Military Order does not grant authority to the Secretary of Defense or any other agent of Respondents to render any individual subject to the Military Order to a foreign government for any purpose whatsoever. Actual rendition, therefore, is *ultra vires* and illegal. Further, rendition of persons subject to the Military Order or the threat thereof violates Section 3(b) of the Military Order and is illegal.

88. Rendition of individuals subject to the Military Order exceeds the Executive’s authority under Article II of the United States Constitution and is *ultra vires* and unlawful.

§ III (G). THE CONDITIONS OF DETENTION AT GUANTÁNAMO, INCLUDING THE THREAT OF RENDITION, VIOLATE H.R. 1268.

89. Recently passed H.R. 1268, “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,” Public Law No: 109-13, includes Section 1031, entitled: “Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment.”

90. Section 1031 of H.R. 1268, provides:

- (a)(1) None of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.
- (2) Nothing in this section shall affect the status of any person under the Geneva Conventions or whether any person is entitled to the protections of the Geneva Conventions.
- (b) As used in this section –
 - (1) the term ‘torture’ has the meaning given that term in section 2340(1) of title 18, United States Code; and
 - (2) the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States.

91. Sections 2340(1)-(3) of Title 18, United States Code, provides:

As used in this chapter –

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from -
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (B) the threat of imminent death; or
 - (C) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

- (3) "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.

92. As set forth above, upon information and belief, detainees have been and continue to be treated inhumanely and held under conditions that violate their constitutional and international rights to dignity and freedom from torture and from cruel, inhumane and degrading treatment or punishment, all of which occur in violation of Section 1031.

93. As set forth above, upon information or belief, detainees have endured or continue to endure or be threatened with isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror, each of were interrogation techniques approved for use at Guantánamo Bay by the most senior Department of Defense lawyer, and all of which occur in violation of Section 1031.

94. As set forth above, upon information or belief, detainees have been or are subject to or are threatened with psychological and physical coercion during interrogations that is "tantamount to torture," all of which occur in violation of Section 1031.

95. As set forth above, upon information or belief, detainees have been, continue to be or are threatened with "highly aggressive interrogation techniques" including 24-plus hour interrogations involving temperature extremes, dogs, prolonged isolation, and loud music, all of which occur in violation of Section 1031.

96. As set forth above, upon information or belief, detainees have been, continue to be or are threatened with sexual taunting, including smearing fake menstrual blood on a detainee's face, all of which occur in violation of Section 1031.

97. As set forth above, upon information or belief, during interrogations, detainees have been threatened with rendition or transfer to countries that routinely practice torture and, moreover, the United States has secretly transferred detainees to such countries without complying with the applicable legal requirements for extradition, which occurs in violation of Section 1031.

98. The foregoing occurrences amount to torture, as that term is defined in 18 U.S.C. § 2340(1), including the intentional infliction of severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon detainees.

99. The foregoing occurrences amount to cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

100. The foregoing occurrences amount to violations of Section 1031, thereby entitling Petitioner Shafiiq to injunctive relief, including an injunction from this Court enjoining Respondents from further obligating or expending funds appropriated under HR 1268 for the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay.

SECTION IV
CAUSES OF ACTION

FIRST CLAIM FOR RELIEF

**(COMMON LAW DUE PROCESS AND DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES AND THE MILITARY ORDER:
UNLAWFUL DEPRIVATION OF LIBERTY AND INHUMANE TREATMENT)**

101. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

102. By the actions described above, Respondents, acting under color of law, have violated and continue to violate common law principles of due process as well as the Due Process Clause of the Fifth Amendment to the Constitution of the United States. President Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without due process of law, and the remaining Respondents have implemented those orders. Respondents' actions deny Petitioner Shafiiq the process accorded to persons seized and detained by the United States military in times of armed conflict as established by, *inter alia*, the Uniform Code of Military Justice, Army Regulation 190 - 8, Articles 3 and 5 of the Third and Fourth Geneva Conventions, and customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

103. To the extent that Petitioner Shafiiq's detention purports to be authorized by the Military Order, that Order violates the Fifth Amendment on its face and as applied to Petitioner.

104. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

105. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SECOND CLAIM FOR RELIEF
**(DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES:
UNLAWFUL CONDITIONS OF CONFINEMENT)**

106. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

107. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the right of Petitioner Shafiiq to be free from unlawful conditions of confinement, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

108. Accordingly, Petitioner Shafiiq is entitled to declaratory and injunctive relief as well as any other relief the court may deem appropriate.

THIRD CLAIM FOR RELIEF
**(GENEVA CONVENTIONS AND THE MILITARY ORDER:
ARBITRARY DENIAL OF DUE PROCESS AND INHUMANE TREATMENT)**

109. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

110. By the actions described above, Respondents, acting under color of law, have denied and continue to deny Petitioner Shafiiq the process accorded to persons seized and detained by the United States military in times of armed conflict as established by specific provisions of the Third and Fourth Geneva Conventions.

111. Violations of the Geneva Conventions are direct treaty violations, are violations of customary international law, and constitute an enforceable claim under 28 U.S.C. § 2241 (c)(3).

112. Respondents are liable for this conduct described above, insofar as they set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, and/or conspired to violate the Geneva Conventions.

113. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

114. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FOURTH CLAIM FOR RELIEF
(INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW
AND THE MILITARY ORDER:
ARBITRARY DENIAL OF DUE PROCESS AND INHUMANE TREATMENT)

115. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

116. By the actions described above, Respondents have denied and continue to deny Petitioner Shafiiq the due process accorded to persons seized and detained by the United States military in times of armed conflict as establish by customary international humanitarian and human rights law as reflected, expressed, and defined in multilateral treaties and other international instruments and domestic judicial decisions, and other authorities.

117. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

118. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FIFTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
TORTURE (INHUMANE TREATMENT))

119. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

120. By the actions described above, the Respondents directed, ordered, confirmed, ratified, and/or conspired to bring about acts that deliberately and intentionally inflicted severe physical and/or psychological abuse and/or agony upon Petitioner Shafiiq in order to obtain coerced information or confessions from him, punish or intimidate Petitioner Shafiiq or for other purposes. Among other abuses, Petitioner Shafiiq has been held in conditions of isolation; placed in constant vulnerability to repeated interrogation and severe beatings; kept in cages with no privacy; shackled with heavy chains and irons; placed in solitary confinement for minor rule infractions for prolonged periods of time; interrogated while shackled and chained in painful positions; exposed to extremes of temperature; subjected to violent behavior or the threat of violence; threatened with rendition to countries that practice torture; sexually humiliated; denied access to counsel and family; deprived of adequate medical care; and/or subjected to repeated psychological abuse.

121. The acts described herein constitute torture in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. §1350, in that the acts violated customary international law prohibiting torture as reflected, expressed, and defined in

multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

122. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

123. Respondents are liable for said conduct because they directed, ordered, confirmed, ratified, and/or conspired together and with others to commit the acts of torture against Petitioner Shafiiq.

124. Petitioner Shafiiq was forced to suffer severe physical and/or psychological abuse and agony and is therefore entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

SIXTH CLAIM FOR RELIEF
**(ALIEN TORT STATUTE AND THE MILITARY ORDER:
WAR CRIMES (INHUMANE TREATMENT))**

125. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

126. By the actions described above, Respondents' acts directing, ordering, confirming, ratifying, and/or conspiring to bring about the torture and other inhumane treatment of Petitioner Shafiiq constitute war crimes and/or crimes against humanity in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated, among others, the Fourth Geneva Convention, Common Article III of the Geneva Conventions and Additional Protocols I and II of the Geneva Conventions as well as customary international law prohibiting war crimes as reflected, expressed,

and defined in other multilateral treaties and international instruments, international and domestic judicial decision, and other authorities.

127. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

128. As a result of Respondents' unlawful conduct, Petitioner Shafiiq has been and is forced to suffer severe physical and/or psychological abuse and agony, and is therefore entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

SEVENTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
CRUEL, INHUMANE OR DEGRADING TREATMENT)

129. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

130. The acts described herein had the intent and the effect of grossly humiliating and debasing Petitioner Shafiiq, forcing him to act against his will and conscience, inciting fear and anguish, and breaking his physical or moral resistance.

131. The acts described herein constitute cruel, inhumane or degrading treatment in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhumane or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

132. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

133. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to cause the cruel, inhumane or degrading treatment of Petitioner Shafiiq.

134. Petitioner Shafiiq was forced to suffer severe physical and/or psychological abuse and agony and is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as other relief to be determined at trial.

EIGHTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
ARBITRARY ARREST AND PROLONGED ARBITRARY DETENTION
(INHUMANE TREATMENT))

135. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

136. The acts described herein constitute arbitrary arrest and detention of Petitioner Shafiiq in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

137. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to bring about the arbitrary arrest and prolonged arbitrary detention of Petitioner Shafiiq in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting arbitrary arrest and prolonged arbitrary

detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

138. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

139. As a result of Respondents' unlawful conduct, Petitioner Shafiiq has been and is deprived of his freedom, separated from his family, and forced to suffer severe physical and mental abuse, and is therefore entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

NINTH CLAIM FOR RELIEF
**(ALIEN TORT STATUTE AND THE MILITARY ORDER:
ENFORCED DISAPPEARANCE (INHUMANE TREATMENT))**

140. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

141. By the actions described above, the Respondents directed, ordered, confirmed, ratified, and/or conspired to bring about the enforced disappearance of Petitioner Shafiiq in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting enforced disappearances as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

142. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

143. As a result of Respondents' unlawful conduct, Petitioner Shafiiq has been and is deprived of his freedom, separated from his family, and forced to suffer severe physical and mental abuse, and is therefore entitled to necessarily related declaratory and injunctive relief and such other relief as the court may deem appropriate.

TENTH CLAIM FOR RELIEF
**(ARTICLE II OF THE UNITED STATES CONSTITUTION:
UNLAWFUL DETENTION)**

144. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

145. Petitioner Shafiiq is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind. The Executive lacks the authority to order or direct military officials to detain civilians who are seized far from the theater of war or occupied territory or who were not "carrying a weapon against American troops on a foreign battlefield." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2642 n.1 (2004).

146. By the actions described above, President Bush has exceeded and continues to exceed the Executive's authority under Article II of the United States Constitution by authorizing, ordering and directing that military officials seize Petitioner Shafiiq and transfer him to military detention, and by authorizing and ordering their continued military detention at Guantánamo Bay. All of the Respondents acted and continue to act without lawful authority by directing, ordering, and/or supervising the seizure and military detention of Petitioner Shafiiq.

147. The military seizure and detention of Petitioner Shafiiq by the Respondents is *ultra vires* and illegal because it violates Article II of the United States Constitution. To the extent that the Executive asserts that Petitioner's detention is

authorized by the Military Order, that Order exceeds the Executive's authority under Article II and is *ultra vires* and void on its face and as applied to Petitioner.

148. To the extent that Respondents assert that their authority to detain Petitioner Shafiiq derives from a source other than the Military Order, including without limitation the Executive's inherent authority to conduct foreign affairs or to serve as Commander-in-Chief of the U.S. Armed Forces, whether from Article II of the Constitution or otherwise, Respondents lack that authority as a matter of fact and law.

149. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

ELEVENTH CLAIM FOR RELIEF
(VIOLATION OF THE APA AND THE MILITARY ORDER:
ARBITRARY AND CAPRICIOUS UNLAWFUL DETENTION (INHUMANE TREATMENT))

150. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

151. Army Regulation 190 - 8 prohibits the detention of civilians who were seized away from the field of battle or outside occupied territory or who were not engaged in combat against the United States. *See, e.g.,* Army Regulation. 190-8 at 1-6(g) ("Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.").

152. By arbitrarily and capriciously detaining Petitioner Shafiiq in military custody for upwards of three years in the manner described above, Respondents have

acted and continue to act *ultra vires* and unlawfully in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2).

153. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

154. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

TWELFTH CLAIM FOR RELIEF
**(VIOLATION OF THE APA AND THE MILITARY ORDER:
ARBITRARY AND CAPRICIOUS DENIAL OF DUE PROCESS (INHUMANE TREATMENT))**

155. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

156. By the actions described above, Respondents, acting under color of law, have arbitrarily and capriciously denied and continue to deny Petitioner Shafiiq the process accorded to persons seized and detained by the United States military in times of armed conflict as established by Army Regulation 190-8 in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2).

157. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

158. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

THIRTEENTH CLAIM FOR RELIEF
**(VIOLATION OF THE APA AND THE MILITARY ORDER:
TORTURE AND CRUEL, INHUMANE OR DEGRADING TREATMENT)**

159. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

160. By the actions described above, the Respondents have acted and continue to act arbitrarily and capriciously by directing, ordering, confirming, ratifying, and/or conspiring to unlawfully subject Petitioner Shafiiq to torture and/or cruel, inhumane or degrading treatment in violation of Army Regulation 190-8 and the Administrative Procedures Act, 5 U.S.C. § 706(2).

161. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

162. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FOURTEENTH CLAIM FOR RELIEF
(VIOLATION OF THE RIGHT TO COUNSEL AND ACCESS TO THE COURTS)

163. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

164. Respondents, purportedly acting from a concern for national security, consistently have contrived to intrude upon Petitioner Shafiiq's right to consult with counsel by conditioning counsel's access to Petitioner on unreasonable terms, including classification/declassification procedures, all in violation of Petitioner Shafiiq's attorney-client privilege, his work product privilege, and the Fifth and Sixth Amendments to the U.S. Constitution.

165. Accordingly, Petitioner Shafiiq is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FIFTEENTH CLAIM FOR RELIEF
**(DUE PROCESS CLAUSE AND THE MILITARY ORDER:
RENDITION OR THE THREAT THEREOF (INHUMANE TREATMENT))**

166. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

167. Upon information and belief, Petitioner Shafiiq is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture and being threatened with same. The transfer of the Petitioner (or threat of same) to a country where there is a foreseeable and direct risk that he will be subjected to torture constitutes a violation of Petitioner's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

168. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

169. Accordingly, Petitioner Shafiiq is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SIXTEENTH CLAIM FOR RELIEF
**(CONVENTION AGAINST TORTURE AND
CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE MILITARY ORDER:
RENDITION (INHUMANE TREATMENT))**

170. Petitioners incorporate by reference all preceding paragraphs as set forth fully herein.

171. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of the Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a direct violation of Petitioner's rights under the Convention Against Torture and the 1954 Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 *entered into force* Apr. 22, 1954.

172. Such rendition would violate the Military Order, as it would constitute illegal and inhumane treatment in violation of Section 3(b) of that order and would otherwise be illegal and *ultra vires*.

173. Accordingly, Petitioner Shafiiq is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SEVENTEENTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
RENDITION (INHUMANE TREATMENT))

174. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

175. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of the Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a violation of Petitioner's rights under customary international law, which may be vindicated under the Alien Tort Statute.

176. Such unlawful acts of Respondents would violate the Military Order, as they would constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

177. Accordingly, Petitioner Shafiiq is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SECTION V
PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. Designate Jamaal Kiyemba as Next Friend of Shafiiq;
2. Grant the Writ of Habeas Corpus and order Respondents to release Petitioner Shafiiq from his current unlawful detention;
3. Order that Petitioner Shafiiq be brought before the Court or before a Magistrate Judge assigned by the Court to conduct proceedings under the supervision of the Court to vindicate his rights;
4. Order that Petitioner Shafiiq cannot be transferred to any other country without the specific written agreement of Petitioner and Petitioner's counsel while this action is pending;
5. Order that Petitioner Shafiiq cannot be delivered, returned, or rendered to a country where there is a foreseeable and imminent risk that Petitioner will be subject to torture;
6. Order Respondents to allow counsel to meet and confer with Petitioner Shafiiq, in private and unmonitored attorney-client conversations;
7. Order Respondents to cease all interrogations of Petitioner Shafiiq, direct or indirect, while this litigation is pending;
8. Order Respondents to cease all acts of torture and cruel, inhumane and degrading treatment of Petitioner Shafiiq;

9. Order and declare that the Military Order of November 13, 2001 is *ultra vires* and unlawful in violation of Article II of the United States Constitution, the Fifth Amendment to the U.S. Constitution, the Uniform Code of Military Justice, the Administrative Procedures Act, 5 U.S.C. §702, the treaties of the United States and customary international law;

10. Order and declare that the prolonged, indefinite, and restrictive detention of Petitioner Shafiiq without due process is arbitrary and unlawful and a deprivation of liberty without due process in violation of common law principles of due process, the Due Process Clause of the Fifth Amendment to the United States Constitution, the regulations of the United States military, the treaties of the United States, and customary international humanitarian law;

11. Order and declare that continued obligating or expending of funds appropriated under HR 1268 to fund the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay is unlawful, and enjoin Respondents from further obligating or expending funds appropriated under HR 1268 for the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay; and

12. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the common law, the United States Constitution, federal statutory law, and international law.

Dated this 18 day of July, 2005

Respectfully submitted,

Counsel for Petitioners:



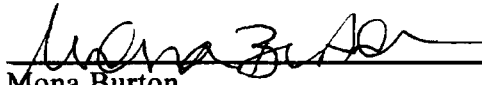
Mona Burton (Utah State Bar #5399)
Robert G. Wing (Utah State Bar #4445)
James R. Farmer (Utah State Bar #8592)
Amy Poulson (Utah State Bar #9378)
J. Triplett Mackintosh (Colorado State Bar
#22359)
Hamid M. Khan (Colorado State Bar #34139)
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111
Tel: (801) 595-7800

Of Counsel
Barbara J. Olshansky (New York State Bar
#3635)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
Telephone: (212) 614-6439

CERTIFICATION OF REPRESENTATION WITHOUT COMPENSATION

Counsel for Petitioner certify, pursuant to L. Cv. R. 83.2(g), that they are representing Petitioner without compensation, and further pursuant to L. Cv. R. 83.2(j), that they have personal familiarity with the Local Rules of this Court.

Dated this 18 day of July, 2005.



Mona Burton
Robert G. Wing
James R. Farmer
Amy Poulson
J. Triplett Mackintosh
Hamid M. Khan
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111
Tel: (801) 595-7800

Of Counsel
Barbara J. Olshansky
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
Telephone: (212) 614-6439

AUTHORIZATION & NOTIFICATION

I, JAMIAL KUYEMBA [REDACTED], UNDERSTAND THE LEGAL TERM "NEXT FRIEND" AND FIRMLY BELIEVE THAT THE FOLLOWING PEOPLE, WHO I HAVE COME TO KNOW DURING MY CAPTIVITY SINCE MARCH 2002, WANT ME TO ACT AS THEIR "NEXT FRIENDS", AND AUTHORIZE CLIVE STAFFORD SMITH TO SEEK ANY LEGAL REDRESS ON THEIR BEHALF THAT IS POSSIBLE, AND I SO AUTHORIZE HIM. I ALSO SUBMIT THIS DOCUMENT AS EVIDENCE, INDEPENDENT OF THEIR RELIANCE UPON ME AS "NEXT FRIENDS", OF THEIR SPECIFIC DESIRE FOR A LAWYER AND FOR A LEGAL CHALLENGE TO THE ILLEGALITY OF THEIR DETENTION BY THE UNITED STATES OF AMERICA.

THIS AUTHORIZATION & NOTIFICATION APPLIES TO ALL PERSONS LISTED ON THE ATTACHED LISTS, AS INITIALED BY ME.

MARCH 10th, 2005.

Kuyemba

SAFIIQ

ALGERIAN

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Kiyurd

CLERK-S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIACO-932
Rev. 4/96NOTICE OF DESIGNATION OF RELATED CIVIL CASES PENDING
IN THIS OR ANY OTHER UNITED STATES COURT**FILED**Civil Action No. **05 1506**
(To be supplied by the Clerk)

JUL 28 2005

NOTICE TO PARTIES:

Pursuant to Rule 405(b)(2), you are required to prepare and submit this form at the time of filing any civil action which is related to any pending cases or which involves the same parties and related subject matter of any dismissed related cases. This form must be prepared in sufficient quantity to provide one copy for the Clerk's records, one copy for the Judge to whom the cases is assigned and one copy for each defendant, so that you must prepare 3 copies for a one defendant case, 4 copies for a two defendant case, etc.

NOTICE TO DEFENDANT:

Rule 405(b)(2) of this Court requires that you serve upon the plaintiff and file with your first responsive pleading or motion any objection you have to the related case designation.

NOTICE TO ALL COUNSEL

Rule 405(b)(3) of this Court requires that as soon as an attorney for a party becomes aware of the existence of a related case or cases, such attorney shall immediately notify, in writing, the Judges on whose calendars the cases appear and shall serve such notice on counsel for all other parties.

The plaintiff, defendant or counsel must complete the following:

1. RELATIONSHIP OF NEW CASE TO PENDING RELATED CASE(S).

A new case is deemed related to a case pending in this or another U.S. Court if the new case: [Check appropriate box(es) below.]

- ☐ (a) relates to common property
- ☒ (b) involves common issues of fact
- ☒ (c) grows out of the same event or transaction
- ☐ (d) involves the validity or infringement of the same patent
- ☐ (e) is filed by the same pro se litigant

2. RELATIONSHIP OF NEW CASE TO DISMISSED RELATED CASE(S)

A new case is deemed related to a case dismissed, with or without prejudice, in this or any other U.S. Court, if the new case involves the same parties and same subject matter.

Check box if new case is related to a dismissed case: ☐

3. NAME THE UNITED STATES COURT IN WHICH THE RELATED CASE IS FILED (IF OTHER THAN THIS COURT):4. CAPTION AND CASE NUMBER OF RELATED CASE(S). IF MORE ROOM IS NEED PLEASE USE OTHER SIDE.

Motai Saib

v. George W. Bush, et al.

C.A. No. 05 1353 RMC

July 27, 2005
DATEMona Burton by GJC
Signature of Plaintiff/Defendant (or counsel)PER
ATTY07/29
2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED DOE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1458 (ESH)

ADIL BIN MUHAMMAD AL
WIRGHI, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1497 (RCL)

NABIL (Last Name Unknown), *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1504 (RMC)

ABBAR SUFIAN AL HAWARY, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1505 (RMC)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
)	
SHAFIIQ (Last Name Unknown), <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1506 (RMC)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
)	
HAMID AL RAZAK, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1601 (GK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
)	

MOHAMMAD AKHTIAR,)	
)	
Petitioner,)	
)	
v.	)	Civil Action No. 05-CV-1635 (PLF)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
<hr/>		
SADAR DOE, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1704 (JR)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
<hr/>		

RESPONDENTS' MOTION FOR ORDER TO SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR LACK OF PROPER "NEXT FRIEND" STANDING OR, IN THE ALTERNATIVE, TO STAY PROCEEDINGS PENDING RELATED APPEALS AND FOR CONTINUED COORDINATION

Respondents hereby respectfully request that the Court order petitioners to show cause why the above-captioned petitions for writ of habeas corpus, not directly authorized by the detainees at Guantanamo Bay for whom habeas relief is sought, but instead brought by other detainees claiming to act as their "next friends," should not be dismissed for lack of proper next friend standing. The putative "next friends," detainees Omar Deghayes, Jamal Kiyemba, Shaker

Aamer, Bisher Al Rawi and Usama Hasan Abu Kabir, former detainee Moazzam Begg, and one unnamed detainee,¹ bear the burden of establishing their next friend status and justifying the exercise of the court's jurisdiction over these actions. See Whitmore v. Arkansas, 495 U.S. 149, 163 (1990) (“‘[N]ext friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another.”). To do so, they must satisfy the “two firmly rooted prerequisites” articulated by the Supreme Court in Whitmore: (1) they must demonstrate that the detainees on whose behalf they claim to file petitions for writ of habeas corpus cannot challenge the legality of their detention themselves; and (2) they must have a significant relationship with each of these detainees in order to demonstrate that they are truly dedicated to each detainee's best interests. Id. at 163-64. The petitions in the above-captioned cases fail to meet either requirement. If petitioners are unable to demonstrate that the petitions were filed by legitimate next friends, the Court cannot exercise jurisdiction over the petitions, and they must be dismissed for lack of standing.²

¹ Although the petition in Akhtiar v. Bush, No. 05-CV-1635 (PLF) was styled as a petition filed pursuant to direct authorization by the detainee for whom habeas relief is being sought in that case, see Akhtiar Petition at 1, upon consultation with counsel to determine the source of counsel's authorization for filing the petition, respondents were informed that “[a]ttorneys with the Center of Constitutional Rights received a communication from a prisoner at Guantanamo that speaks English . . . [who] relayed a request from Mr. Mohammad Akhtiar for legal representation.” See Declaration of Richard A. Grigg, ¶ 4 (attached hereto as Exhibit A). Thus, the petition in this case should have been styled as one filed through a putative next friend, the unnamed “prisoner at Guantanamo that speaks English.”

² The issue of next friend standing was raised sua sponte by Judge Roberts in Ahmed v. Bush, No. 05-CV-0665 (RWR), another Guantanamo Bay detainee case. Based on an observation that the petition presented scant facts demonstrating that the Whitmore requirements were satisfied, Judge Roberts ordered petitioners to file a memorandum and supporting materials tending to demonstrate that the detainee who purported to act as next friend in that case should be granted next friend standing. See Ahmed v. Bush, No. 05-CV-0665 (RWR) (Order dated May 24, 2005) (dkt. no. 12). Petitioners filed a memorandum in response to the Court's Order, in an

If the above-captioned cases are not dismissed for lack of proper next friend standing, the cases nonetheless should be stayed pending resolution of all appeals in Khalid v. Bush, Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005), and In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 355 F. Supp. 2d 443 (D.D.C. 2005), appeal on petition for interlocutory appeal, No. 05-5064 (D.C. Cir. Mar. 10, 2005). The pending appeals will address the core issues in these cases and, thus, determine how these cases should proceed, if at all. It makes no sense for these cases to proceed in any substantive fashion prior to resolution of the appeals; further proceedings would require the expenditure of significant judicial and other resources that may be avoided as a result of the appeals, and, in any event, such proceedings very likely would have to be revisited or relitigated once the appeals are decided and the Court of Appeals provides guidance regarding handling of the claims in all of the Guantanamo detainee cases.

attempt to demonstrate that both prongs of the Whitmore test were satisfied. See Ahmed v. Bush, No. 05-CV-0665 (RWR) (dkt. no. 13). Although respondents filed a response to petitioners' memorandum indicating that they took no position on petitioners' memorandum at that time, see Ahmed v. Bush, No. 05-CV-0665 (RWR) (dkt. no. 14), and the Court in that case did not issue any subsequent ruling on the issue, respondents now seek to challenge next friend standing in these recently-filed Guantanamo Bay detainee cases in which the appropriate next friend standing requirements have not been satisfied.

ARGUMENT

I. Petitioners Should Establish Proper “Next Friend” Standing or the Above-Captioned Cases Should be Dismissed.

It is well-established that “before a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue” under Article III of the Constitution. Whitmore, 495 U.S. at 154. The standing doctrine “ensure[s] that the plaintiff has a sufficient personal stake in the outcome of a dispute to render judicial resolution of it appropriate in a society that takes seriously both the idea of separation of powers and, more fundamentally, the system of democratic self-government that such separation serves.” Hamdi v. Rumsfeld, 294 F.3d 598, 602-03 (4th Cir. 2002) (citation and internal quotations omitted).³ “In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Seldin, 422 U.S. 490, 498 (1975). A habeas petitioner has proper standing only if the petition is “signed and verified by the person for whose relief it is intended or by someone acting in his behalf.” 28 U.S.C. § 2242. If a petition is brought by someone acting on behalf of the person for whose relief the petition is intended, this “next friend” does not become a party to the action, but

³ The cited 2002 decision of the Fourth Circuit in Hamdi ordered dismissal of a habeas case that a public defender and private citizen brought as purported next friends of Hamdi despite having no relationship with him. That deficiency was cured when Hamdi’s father filed a legitimate next-friend petition bearing the same style, which eventually culminated in the 2004 decision of the Supreme Court in Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). See Hamdi, 294 F.3d at 600 n.1, 606-07 & n.4; see also Hamdi, 124 S. Ct. at 2636. Of course, neither the fact that the defect was cured, nor the Supreme Court’s ultimate decision in the properly filed habeas case, undermines or casts doubt on the Fourth Circuit’s holdings concerning next-friend standing in the defective case brought by the public defender and private citizen.

“simply pursues the cause on behalf of the detained person, who remains the real party in interest.” Whitmore, 495 U.S. at 163.

Next friend standing is not automatically granted to anyone who seeks to pursue an action on behalf of another person, however. See id. Rather, consistent with the constitutional limits established by Article III, a litigant who asserts next friend standing bears the burden of satisfying the “two firmly rooted prerequisites” for next friend status articulated by the Supreme Court in Whitmore:

First, a “next friend” must provide an adequate explanation — such as inaccessibility, mental incompetence, or other disability — why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the “next friend” must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a “next friend” must have some significant relationship with the real party in interest.

Id. at 163-64 (internal citations omitted).

The petitions in the above-captioned cases do not meet either prong of the Whitmore test. First, petitioners have failed to demonstrate that the detainees for whom habeas relief is sought cannot submit petitions on their own behalf. As explained in the Declaration of Frank Sweigart, the Department of Defense (“DoD”) has notified each detainee at Guantanamo Bay of his right to file a petition for habeas corpus, and has provided each detainee with the address of the United States District Court in the event that he desires to submit his own petition to the Court.⁴ See Sweigart Declaration, ¶¶ 3-5 (attached hereto as Exhibit B). As a result of these notifications, 55

⁴ Detainees are afforded the opportunity regularly to send and receive mail through the mail system administered by DoD and through the International Committee for the Red Cross. Detainees are supplied pens, paper and envelopes regularly, and mail privileges cannot be revoked. See Sweigart Declaration, Ex. D.

pro se petitions for writ of habeas corpus have already been filed with the Court,⁵ and at least 18 detainees have written directly to counsel and secured assistance in filing petitions.⁶

Furthermore, the American Bar Association (“ABA”) has agreed to recruit volunteer counsel for pro se petitioners and other detainees who request the assistance of counsel in filing a petition for

⁵ See Khiali-Gul v. Bush, No. 05-CV-0877 (JR); Rahmattullah v. Bush, No. 05-CV-0878 (CKK); Mohammad v. Bush, No. 05-CV-0879 (RBW); Nasrat v. Bush, No. 05-CV-0880 (ESH); Slahi v. Bush, No. 05-CV-0881 (JR); Rahman v. Bush, No. 05-CV-0882 (GK); Bostan v. Bush, No. 05-CV-0883 (RBW); Muhibullah v. Bush, No. 05-CV-0884 (RMC); Mohammad v. Bush, No. 05-CV-0885 (GK); Wahab v. Bush, No. 05-CV-0886 (EGS); Chaman v. Bush, No. 05-CV-0887 (RWR); Gul v. Bush, No. 05-CV-0888 (CKK); Basardh v. Bush, No. 05-CV-0889 (ESH); Khan v. Bush, No. 05-CV-0890 (RMC); Nasrullah v. Bush, No. 05-CV-0891 (RBW); Shaaban v. Bush, No. 05-CV-0892 (CKK); Sohail v. Bush, No. 05-CV-0993 (RMU); Tohirjanovich v. Bush, No. 05-CV-0994 (JDB); Slahi v. Bush, No. 05-CV-0995 (JR); Mohammad v. Bush, No. 05-CV-0996 (JR); Khudaiddad v. Bush, No. 05-CV-0997 (PLF); Al Karim v. Bush, No. 05-CV-0998 (RMU); Al-Khalaqi v. Bush, No. 05-CV-0999 (RBW); Sarajuddin v. Bush, No. 05-CV-1000 (PLF); Kahn v. Bush, No. 05-CV-1001 (ESH); Mohammed v. Bush, No. 05-CV-1002 (EGS); Mangut v. Bush, No. 05-CV-1008 (JDB); Hamad v. Bush, No. 05-CV-1009 (JDB); Khan v. Bush, No. 05-CV-1010 (RCL); Zuhoor v. Bush, No. 05-CV-1011 (JR); Ali Shah v. Bush, No. 05-CV-1012 (ESH); Salaam v. Bush, No. 05-CV-1013 (JDB); Mammar v. Bush, No. 05-CV-1233 (RCL); Ahmed v. Bush, No. 05-CV-1234 (EGS); Baqi v. Bush, No. 05-CV-1235 (PLF); Abdulzaher v. Bush, No. 05-CV-1236 (RWR); Aminullah v. Bush, No. 05-CV-1237 (ESH); Ghalib v. Bush, No. 05-CV-1238 (CKK); Al Khaiy v. Bush, No. 05-CV-1239 (RCL); Altaiy v. Bush, No. 05-CV-1240 (RCL); Bukhari v. Bush, No. 05-CV-1241 (RMC); Pirzai v. Bush, No. 05-CV-1242 (RCL); Peerzai v. Bush, No. 05-CV-1243 (RCL); Alsawam v. Bush, No. 05-CV-1244 (CKK); Mohammadi v. Bush, No. 05-CV-1246 (RWR); Al Ginco v. Bush, No. 05-CV-1310 (RCL); Ullah v. Bush, No. 05-CV-1311 (RCL); Al Bihani v. Bush, No. 05-CV-1312 (RCL); Sadkhan v. Bush, No. 05-CV-1487 (RMC); Faizullah v. Bush, No. 05-CV-1489 (RMU); Faraj v. Bush, No. 05-CV-1490 (PLF); Khan v. Bush, No. 05-CV-1491 (JR); Ahmad v. Bush, No. 05-CV-1492 (RCL); Amon v. Bush, No. 05-CV-1493 (RBW); Idris v. Bush, No. 05-CV-1555 (JR).

⁶ See Al Qosi v. Bush, No. 04-CV-1937 (PLF); Abdullah v. Bush, No. 05-CV-0023 (RWR) (Rami Bin Saad Al-Oteibi); Al-Wazan v. Bush, No. 05-CV-329 (PLF); Alhami v. Bush, No. 05-CV-359 (GK); Ameziane v. Bush, No. 05-CV-392 (ESH); Qassim v. Bush, No. 05-CV-497 (JR); Tumani v. Bush, No. 05-CV-0526 (RMU); Mokit v. Bush, No. 05-CV-0621 (PLF); Battayav v. Bush, No. 05-CV-0714 (RBW); Hamoodah v. Bush, No. 05-CV-0795 (RCL); Mousovi v. Bush, No. 05-CV-1124 (RMC) (Abdul Razak Iktiar Mohammed); Faraj v. Bush, No. 05-CV-1590 (JDB) (case voluntarily dismissed because of earlier-filed pro se case submitted by petitioner); Zahir v. Bush, No. 05-CV-1623 (CKK); El-Marqodi v. Bush, No. 05-CV-1649 (PLF); Khandan v. Bush, No. 05-CV-1697 (PLF).

writ of habeas corpus. See Sweigart Declaration, ¶ 7. DoD will soon begin delivering a notification to these detainees to advise them of the ABA's offer to secure them legal representation, and to provide them with the address of the ABA if they desire such assistance. See id. In addition, all detainees at Guantanamo Bay have the ability to send and receive mail, allowing them to contact family and friends, see Sweigart Declaration, Ex. D; supra, note 4, and they have been informed of the option of contacting friends and family to have them file habeas petitions on their behalf.

Given that all detainees have been notified of their right to submit petitions for writ of habeas corpus; that they have the ongoing opportunity to send mail to family, friends, and the Court; and that the ABA has agreed to offer the detainees assistance in securing legal representation, it cannot simply be assumed that the detainees seeking habeas relief in the above-captioned cases cannot file petitions on their own behalf. The next friend petitions, however, do just that. See, e.g., Nabil Petition, ¶ 6 ("Because [Jamaal Kiyemba's] co-detainee and friend has been denied access to legal counsel and to the courts of the United States, Jamaal Kiyemba acts as his Next Friend, per 28 U.S.C. § 2241 and 2242."); Ahmed Doe Petition, ¶ 4 ("Because [Omar Deghayes's] friend has been denied access to legal counsel and to the courts of the United States, Omar Deghayes acts as his Next Friend."). See also Ahmed v. Bush, No. 05-CV-0665 (RWR) (Order dated May 24, 2005) (dkt. no. 12) ("The petition presumes, rather than demonstrates through facts, that Ahmed has been denied access to the courts of the United States. . . . In light of the fact that several pro se petitions have been filed recently by Guantanamo Bay detainees, Ahmed's lack of access to this court cannot be presumed, but must be established."). Absent evidence that the detainees on whose behalf these cases are filed cannot submit petitions on their

own behalf, petitioners cannot demonstrate proper next friend standing, and the Court cannot exercise jurisdiction over the petitions in the above-captioned cases. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (“It is a long-settled principle that standing cannot be ‘inferred argumentatively from averments in the pleadings,’ but rather ‘must affirmatively appear in the record.’”) (citations omitted).

The purported “next friends” in the above-captioned cases have also failed to satisfy the second requirement of the Whitmore test — they have not established that they have a “significant relationship” with each detainee such that they are “truly dedicated to the[ir] best interests.” See Whitmore, 495 U.S. at 163-64.⁷ The requirement of a “significant relationship”

⁷ The majority of Circuits that have been confronted with the issue have construed Whitmore to require a “significant relationship” as part of the second prong of the test for next friend standing. See Hamdi v. Rumsfeld, 294 F.3d 598, 604 (4th Cir. 2002) (“Whitmore is thus most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest.”); Coalition of Clergy, Lawyers, and Professors v. Bush, 310 F.3d 1153, 1162 (9th Cir. 2002) (“Combining the ‘significant relationship’ requirement, however, with the ‘dedicated to best interests’ consideration . . . meets the concerns the Whitmore Court addressed.”); T.W. v. Brophy, 124 F.3d 893, 897 (7th Cir. 1997) (“It follows, as the Court suggested in the Whitmore case, that not just anyone who expresses an interest in the subject matter of a suit is eligible to be the plaintiff’s next friend – that he ‘must have some significant relationship with the real party in interest’”); Amerson v. Iowa, 59 F.3d 92, 93 n.3 (8th Cir. 1995) (under Whitmore, the “next friend has [the] burden to establish . . . that she has some “significant relationship with [the] real party in interest”); Zettlemoyer v. Horn, 53 F.3d 24, 27 n.4 (3d Cir. 1995) (observing that “[t]he Whitmore Court also . . . suggested that the party ‘must have some significant relationship with the real party in interest’”). See also Al Odah v. Bush, 321 F.3d 1134, 1138 (D.C. Cir. 2003), rev’d on other grounds, Rasul v. Bush, 542 U.S. 466 (2004) (stating that the family members of Guantanamo detainees who filed habeas petitions on their behalf “demonstrated through affidavits that they are ‘truly dedicated to the best interests of these individuals,’ [and] that they have a ‘significant relationship’ with the detainees . . .”) (citing Whitmore, 495 U.S. at 163-64). Although the Eleventh Circuit questioned whether Whitmore established “some significant relationship” as an independent requirement, it nevertheless noted the importance of a relationship in demonstrating whether a putative next friend “can show true dedication to the best interests of the person on whose behalf he seeks to litigate.” Sanchez-Velasco v. Secretary of the Dep’t of Corrections, 287 F.3d 1015, 1026-27 (11th Cir. 2002). See also Centobie v. Campbell, 407 F.3d 1149, 1151 (11th Cir. 2005) (“We conclude that Puzone is

with the real party in interest is necessary to ensure that a next friend will genuinely pursue the interests of the person in custody (who at all times remains the real party in interest) and will not (1) merely use the litigation as a vehicle for advancing his own agenda or (2) assume he or she is in tune with the real party's desires and interests. See id. at 164 (cautioning against "intruders or uninvited meddlers" filing lawsuits on behalf of unwitting strangers).

Thus, under the "significant relationship" requirement, courts have generally limited next friend standing to close relatives such as parents, siblings, and spouses. See, e.g., Vargas v. Lambert, 159 F.3d 1161, 1168 (9th Cir. 1998) (mother); Hamdi, 294 F.3d at 600 n.1 (father); Smith ex rel. Missouri Pub. Defender Comm'n v. Armontrout, 812 F.2d 1050 (8th Cir. 1987) (brother); In re Ferrens, No. 4746, 8 F. Cas. 1158, 1159 (S.D.N.Y. 1869) (wife). Attorneys who have previously represented an individual seeking habeas corpus have also been permitted to act as next friends based on that pre-existing relationship. See Sanchez-Velasco, 287 F.3d at 1026 ("'[S]ome significant relationship' does exist when the would-be next friend has served in a prior proceeding as counsel for the real party in interest and did so with his consent."). Distant relatives or simple acquaintances generally do not have a sufficient relationship to establish next friend standing, see, e.g., Davis v. Austin, 492 F. Supp. 273, 274-76 (N.D. Ga. 1980) (neither detainee's first cousin nor a minister who had counseled detainee could sue as next friend) (cited with approval in Whitmore, 495 U.S. at 164), and petitions filed by total strangers purporting to act as next friends are typically dismissed for lack of jurisdiction. See, e.g., Hamdi, 294 F.3d at

not 'truly dedicated to the best interests of the person on whose behalf [s]he seeks to litigate,' and she does not have 'some significant relationship with the party in interest.'") (citing Hauser v. Moore, 223 F.3d 1316, 1322 (11th Cir. 2000)).

603-07 (dismissing petitions brought by a public defender and private citizen who had no relationship to the detainee).

In the above-captioned cases, petitioners have not demonstrated that Omar Deghayes, Jamal Kiyemba, Shaker Aamer, Bisher Al Rawi, Usama Hasan Abu Kabir, Moazzam Begg and the unnamed detainee have any sort of “significant relationship” with the detainees on whose behalf they claim to seek habeas relief. The “authorizations” signed by the putative next friends contain boilerplate language stating that they understand what it means to act as a “next friend,” and that they believe that the detainees on whose behalf they claim to seek habeas relief want legal representation to challenge their detention, without stating any legitimate basis for their belief beyond the fact that they have also been detained at Guantanamo Bay.⁸ See, e.g., Ahmed Doe, Deghayes Authorization (attached to Petition) (stating, “I know that they want legal assistance to secure their freedom . . .” but not explaining how); Sadar Doe, Kabir Authorization (attached to Petition) (stating, “I . . . know that the following people who I know from this prison want lawyers and want me to assert their legal rights . . .” without explaining the basis for this knowledge).⁹ Personal data about the detainees is scant, and in some cases, the so-called next

⁸ If a detainee were able to act as next friend for another detainee simply based on the mere fact that they are both detained at Guantanamo, detainees or prisoners could purport to bring mass habeas corpus petitions simply by being able to list the identities of those detained alongside them, a situation that is surely inconsistent with standing jurisprudence.

⁹ Former detainee Moazzam Begg, who purports to act as next friend to petitioner Adil Bin Muhammad Al Wirghi, see Declaration of Moazzam Begg (attached to Al Wirghi Petition), was transferred out of Guantanamo Bay in January 2005, before the wave of pro se petitions filed by Guantanamo Bay detainees and months before he signed the declaration claiming that he knows that petitioner Al Wirghi “would want [Moazzam Begg] to assert his legal rights and act as his Next Friend in bringing proceedings upon his behalf,” purportedly based on a conversation regarding the denial of legal representation to Guantanamo Bay detainees. Id.

friends do not even know the detainees' full names. See, e.g., Ahmed Doe, Nabil, Shafiq, Sadar Doe. This dearth of basic biographical and personal information about the detainees on whose behalf habeas relief is sought indicates that the purported next friends do not share any meaningful relationship with these detainees and, therefore, cannot be determined to be acting in their best interests. See Ahmed v. Bush, No. 05-CV-0665 (RWR) (Order dated May 24, 2005) (dkt. no. 12) ("The petition does not provide basic personal facts about Ahmed, such as his citizenship, his age, whether he is married or has a family, the place of his arrest or capture, and the places of detention, if any, prior to his being transported to Guantanamo Bay. The absence of such facts leaves the impression that Hassen does not know even this much about Ahmed and his situation."). Because even acquaintances cannot satisfy the requirement of a significant relationship under Whitmore, and the minimal information presented in the petitions indicates that the purported next friends merely know of another detainee or, at best, are mere acquaintances with the detainees on whose behalf they seek habeas relief, the individuals have failed to demonstrate that they are "truly dedicated to the [detainees'] best interests." Whitmore, 495 U.S. at 163. Absent proof that evidences a significant relationship, petitioners cannot demonstrate proper next friend standing, and the Court cannot exercise jurisdiction over the petitions in the above-captioned cases.¹⁰

¹⁰ Over 135 detainees at Guantanamo Bay have filed petitions for writ of habeas corpus through family members who arguably meet the "significant relationship" requirement. See, e.g., Hatim v. Bush, No. 05-CV-1429 (RMU) (filed on behalf of two detainees by their siblings, Fatima Nasser Yahia Abdullah Kussrof and Ali Mohammed Saleh Al-Salahi); Rabbani v. Bush, No. 05-CV-1607 (JR) (filed on behalf of two detainees by their wives, Malika and Fouzia Ahmmed); Sadkhan v. Bush, No. 05-CV-1679 (R JL) (filed on behalf of detainee by his father, Jabbar Sadkhan Al-Sahlani).

In addition to the jurisdictional defect arising out of the lack of a significant relationship between the purported next friend and the party in interest, the phenomenon of detainees filing petitions purportedly on behalf of other detainees about whom they have little knowledge presents the practical difficulty of identifying the detainees for whom habeas relief is sought. Given the similar names or aliases of many of the approximately 500 individuals detained at Guantanamo Bay, it is often difficult, if not impossible, to correctly identify detainees based on the minimal information provided in the petitions. Respondents are often left trying to guess at a detainee's identity. Indeed, respondents have yet to identify more than two dozen purported petitioners as individuals presently detained at Guantanamo Bay, despite having requested additional information from these petitioners' counsel. Moreover, there have already been two instances in which respondents incorrectly identified petitioners in the Guantanamo Bay detainee cases; errors which, unfortunately, were not discovered until counsel visited and interviewed these detainees at Guantanamo Bay. Requiring petitions to be filed either through direct authorization by the detainees on whose behalf habeas relief is sought, or through individuals who can demonstrate a significant relationship with the detainees, would diminish the identification issues that have plagued the parties in the Guantanamo detainee litigation thus far.¹¹

In sum, the petitions in the above-captioned cases fail to satisfy the standing requirements articulated by the Supreme Court in Whitmore. If petitioners are unable to demonstrate that the

¹¹ In addition, the phenomenon of detainees purporting to act as next friends results in counsel improperly abusing the next friend device in order merely to solicit the Guantanamo detainee population for clients, while in the meantime seeking various forms of relief with respect to anyone a purported next friend detainee, such as Mr. Deghayes, can remember having come in contact with.

petitions were filed by legitimate next friends, the Court cannot exercise jurisdiction over the petitions, and they must be dismissed for lack of standing.

II. If the Court Does Not Dismiss the Above-Captioned Cases, They Should be Stayed Pending Resolution of the Appeals of Decisions in the Other Guantanamo Detainee Cases Adjudicating Common Issues.

If the Court finds that the petitions in the above-captioned cases were filed by legitimate next friends,¹² the Court should stay proceedings in these cases pending the resolution of the appeals in Khalid, Boumediene and In re Guantanamo Detainee Cases, which will determine whether and how these cases should proceed.

On January 19, 2005, Judge Leon granted respondents' motion to dismiss or for judgment in its entirety, concluding that constitutional protections do not extend to aliens outside sovereign United States territory, such as petitioners, and that petitioners also have no viable claims under U.S. statutory law or international law or treaties. See Khalid v. Bush, No. 04-CV-1142 (RJL), Boumediene v. Bush, No. 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005). The Khalid and Boumediene cases are currently on appeal to the D.C. Circuit. See Nos. 05-5062, 05-5063 (D.C. Cir.).

¹² Even if the Court finds that petitioners have established next friend standing so that the Court can exercise jurisdiction over the petitions, the next friends should not be permitted to serve in this capacity beyond the time when counsel are permitted to meet with the detainees for whom habeas relief is sought. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 8, 2004), § III.C. (attached hereto as Exhibit C) (permitting counsel two visits with a detainee before an authorization of representation by the detainee must be provided to respondents). At that time, counsel should determine these detainees' wishes concerning pursuing a challenge to their detention through the habeas petitions in these cases, such that the cases can then either be converted into direct petitions or be dismissed.

On January 31, 2005, Judge Green entered an order (and memorandum opinion) in eleven other of the pending Guantanamo Bay detainee cases¹³ denying in part and granting in part respondents' motion to dismiss or for judgment as a matter of law. See Memorandum Opinion Denying in Part and Granting in Part Respondents' Motion to Dismiss or for Judgment as a Matter of Law in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 355 F. Supp. 2d 443 (D.D.C. 2005). Contrary to the prior decision of Judge Leon, Judge Green, inter alia, determined that procedural "due process" protections apply to aliens detained at Guantanamo Bay and that the Combatant Status Review Tribunal proceedings the military has used to confirm detainees' status as enemy combatants do not satisfy these due process requirements. Id. at 453-78. Further, in her decision, Judge Green agreed with the decision of Judge Robertson in Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), rev'd, 415 F.3d 33 (D.C. Cir. 2005), and concluded that the Third Geneva Convention is "self-executing" and can provide petitioners with a claim in a habeas action.¹⁴ 355 F. Supp. 2d at 478-80. Judge Green, however, dismissed petitioners' remaining constitutional, statutory, international law, and treaty claims. Id. at 480-81.

Judge Green noted that her January 31, 2005 decision on respondents' motion to dismiss or for judgment "technically applie[d] only to the eleven cases contained in the [opinion's]

¹³ Hicks v. Bush, No. 02-CV-0299 (CKK); Al Odah v. United States, No. 02-CV-0828 (CKK); Habib v. Bush, No. 02-CV-1130 (CKK); Kurnaz v. Bush, No. 04-CV-1135 (ESH); O.K.v. Bush, No. 04-CV-1136 (JDB); Begg v. Bush, No. 04-CV-1137 (RMC); El-Banna v. Bush, No. 04-CV-1144 (RWR); Gherebi v. Bush, No. 04-CV-1164 (RBW); Anam v. Bush, No. 04-CV-1194 (HHK); Almurbati v. Bush, No. 04-CV-1227 (RBW); and Abdah v. Bush, No. 04-CV-1254 (HHK).

¹⁴ The D.C. Circuit held in Hamdan that the Third Geneva Convention does not give rise to claims enforceable in court. See Hamdan, 415 F.3d at 40.

caption,” but the Court nevertheless acknowledged that the opinion “addresse[d] issues common” to eight other Guantanamo Bay detainee cases that had been filed during or after the briefing and oral argument that resulted in the Court’s opinion.¹⁵ See id. at 452 & n.15.

On February 3, 2005, respondents filed a motion seeking certification of the January 31, 2005 order for interlocutory appeal and filed a motion to stay all the Guantanamo Bay detainee cases pending at that time, consistent with the need for these cases to proceed in a coordinated fashion. Thus, the motion was filed as a motion for certification of order for interlocutory appeal and for a stay in the eleven cases in which the January 31, 2005 order was entered, and was filed by respondents solely as a motion to stay in the other then-pending cases. Judge Green certified her January 31, 2005 decision on respondents’ motion to dismiss or for judgment for appeal and stayed proceedings in the eleven cases in which the January 31, 2005 order was entered, “for all purposes pending resolution of all appeals.” Judge Green left the decision whether to stay cases other than the eleven to the individual judges in those cases. See Order Granting in Part and Denying in Part Respondents’ Motion for Certification of Jan. 31, 2005 Orders and for Stay in In re Guantanamo Detainee Cases (Feb. 3, 2005) (Green, J.).

Various petitioners in the eleven cases sought reconsideration of Judge Green’s stay order, arguing that the Court should permit factual development and proceedings regarding detainee living conditions to go forward. See, e.g., Petr’s Motion for Reconsideration of Order

¹⁵ Belmar v. Bush, No. 04-CV-1897 (RMC); Al-Qosi v. Bush, No. 04-CV-1937 (PLF); Paracha v. Bush, No. 04-CV-2022 (PLF); Al-Marri v. Bush, No. 04-CV-2035 (GK); Zemiri v. Bush, No. 04-CV-2046 (CKK); Deghayes v. Bush, No. 04-CV-2215 (RMC); Mustapha v. Bush, No. 05-CV-22 (JR); Abdullah v. Bush, No. 05-CV-23 (RWR).

Granting Stay Pending Appeal at 9-10 (dkt. no. 203 in Al Odah, No. 02-CV-0828 (CKK)). Judge Green, however, denied the motion for reconsideration

in light of the substantial resources that would be expended and the significant burdens that would be incurred should this litigation go forward, and . . . [in] recognition that a reversal of the Court's January 31, 2005 rulings would avoid the expenditure of such resources and incurrence of such burdens

See Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 355 F. Supp. 2d 482 (D.D.C. 2005) (Green, J.).

On February 9, 2005, pursuant to Judge Green's certification, respondents filed a petition for interlocutory appeal of the January 31, 2005 decision with the D.C. Circuit, see 28 U.S.C. § 1292(b), and requested that the appeal proceed on an expedited basis. Further, petitioners in the eleven cases subject to Judge Green's decision filed a cross-petition for interlocutory appeal with the D.C. Circuit and petitioners in Al-Odah appealed Judge Green's stay order. On March 10, 2005, the D.C. Circuit accepted the interlocutory appeal. In addition, as noted above, petitioners in Khalid and Boumediene appealed Judge Leon's decision. Oral argument in both appeals is scheduled for September 8, 2005.

In light of these pending appeals, several of the cases pending at the time of Judge Green's decision, but that Judge Green did not stay, have been stayed pending appeal. See Paracha, No. 04-CV-2022 (PLF) (dkt. no. 49); Al Marri, No. 04-CV-2035 (GK) (dkt. no. 26); Zemiri, No. 04-CV-2046 (CKK) (dkt. no. 32); Deghayes, No. 04-CV-2215 (RMC) (dkt. no. 7); Mustapha, No. 05-CV-22 (JR) (dkt no. 7); Abdullah, No. 05-CV-23 (RWR) (dkt. no. 16). As Judge Kessler stated in her stay order in Al Marri,

The opinions resolving Judge Leon's and Judge Green's cases encompass and discuss many of the precise issues raised in Respondents' Motion [to Stay]. Thus, until the Court of Appeals addresses these issues, the law in this Circuit is unsettled, since Judge Green and Judge Leon reached different conclusions about many of the issues before them. Requiring this case to proceed before appellate resolution of those cases therefore would involve an unnecessary expenditure of judicial resources.

Order dated March 8, 2005 in Al-Marri, No. 04-CV-2035 (GK), at 2.

Since February 3, 2005 – the date respondents moved to stay all of the Guantanamo Bay detainee cases pending at that time – over 125 new petitions, involving approximately 200 petitioners, have been filed. Respondents have filed motions to stay proceedings in these new cases for the reasons stated herein, and several Judges of this Court have stayed proceedings in the cases pending before them.¹⁶

¹⁶ See Al Mohammed v. Bush, No. 05-CV-0247 (HHK) (dkt. no. 18); El-Mashad v. Bush, No. 05-CV-0270 (JR) (dkt. no. 29); Al-Adahi v. Bush, No. 05-CV-0280 (GK) (dkt. no. 35); Al Joudi v. Bush, No. 05-CV-0301 (GK) (dkt. no. 26); Al-Wazan v. Bush, No. 05-CV-0329 (PLF) (dkt. no. 15); Al-Anazi v. Bush, No. 05-CV-0345 (JDB) (dkt. no. 21); Alhami v. Bush, No. 05-CV-0359 (GK) (dkt. no. 20); Ameziane v. Bush, No. 05-CV-0392 (ESH) (dkt. no. 12); Sliti v. Bush, No. 05-CV-0429 (RJL) (dkt. no. 8); M.C. v. Bush, No. 05-CV-0430 (ESH) (dkt. no. 10); Kabir v. Bush, No. 05-CV-0431 (RJL) (dkt. no. 10); Qayed v. Bush, No. 05-CV-0454 (RMU) (dkt. no. 4); Al-Shihry v. Bush, No. 05-CV-0490 (PLF) (dkt. no. 14); Aziz v. Bush, No. 05-CV-492 (JR) (dkt. no. 16); Qassim v. Bush, No. 05-CV-0497 (JR) (dkt. no. 14); Al-Oshan v. Bush, No. 05-CV-0520 (RMU) (dkt. no. 12); Tumani v. Bush, No. 05-CV-0526 (RMU) (dkt. no. 5); Al-Oshan v. Bush, No. 05-CV-0533 (RJL) (dkt. no. 6); Al Shamri v. Bush, No. 05-CV-0551 (RWR) (dkt. no. 10); Salahi v. Bush, No. 05-CV-0569 (JR) (dkt. no. 8); Mammar v. Bush, No. 05-CV-0573 (RJL) (dkt. no. 5); Al-Sharekh v. Bush, No. 05-CV-0583 (RJL) (dkt. no. 9); Magram v. Bush, No. 05-CV-0584 (CKK) (dkt. no. 9); Al Rashaidan v. Bush, No. 05-CV-0586 (RWR) (dkt. no. 10); Mokit v. Bush, No. 05-CV-0621 (PLF) (dkt. no. 13); Al Daini v. Bush, No. 05-CV-0634 (RWR) (dkt. no. 10); Ahmed v. Bush, No. 05-CV-0665 (RWR) (dkt. no. 16); Battayav v. Bush, No. 05-CV-0714 (RBW) (dkt. no. 12); Adem v. Bush, No. 05-CV-0723 (RWR) (dkt. no. 13); Hamliily v. Bush, No. 05-CV-0763 (JDB) (dkt. no. 10); Imran v. Bush, No. 05-CV-0764 (CKK) (dkt. no. 6); Al Hamamy v. Bush, No. 05-CV-0766 (RJL) (dkt. no. 6); Hamoodah v. Bush, No. 05-CV-0795 (RJL) (dkt. no. 13); Rahmattullah v. Bush, No. 05-CV-0878 (CKK) (dkt. no. 3); Nasrat v. Bush, No. 05-CV-0880 (ESH) (dkt. no. 4); Slahi v. Bush, No. 05-CV-0881 (RWR) (dkt. no. 5); Chaman v. Bush, No. 05-CV-0887 (RWR) (dkt. no. 7); Gul v.

If the Court finds that the above-captioned cases have been filed by legitimate next friends, the cases should nevertheless be stayed pending the appeals of the other Guantanamo Bay detainee cases.¹⁷ The petitions in these cases raise legal issues that were squarely addressed

Bush, No. 05-CV-0888 (CKK) (dkt. no. 3); Basardh v. Bush, No. 05-CV-0889 (ESH) (dkt. no. 4); Shaaban v. Bush, No. 05-CV-0892 (CKK) (dkt. no. 3); Tohirjanovich v. Bush, No. 05-CV-0994 (JDB) (dkt. no. 4); Al Karim v. Bush, No. 05-CV-0998 (RMU) (dkt. no. 3); Al-Khalaqi v. Bush, No. 05-CV-0999 (RBW) (dkt. no. 3); Kahn v. Bush, No. 05-CV-1001 (ESH) (dkt. no. 3); Mangut v. Bush, No. 05-CV-1008 (JDB) (dkt. no. 2); Hamad v. Bush, No. 05-CV-1009 (JDB) (dkt. no. 4); Khan v. Bush, No. 05-CV-1010 (RJI) (dkt. no. 3); Ali Shah v. Bush, No. 05-CV-1012 (ESH) (dkt. no. 3); Salaam v. Bush, No. 05-CV-1013 (JDB) (dkt. no. 2); Al-Hela v. Bush, No. 05-CV-1048 (RMU) (dkt. no. 12); Zalita v. Bush, No. 05-CV-1220 (RMU) (dkt. no. 3); Aminullah v. Bush, No. 05-CV-1237 (ESH) (dkt. no. 3); Ghalib v. Bush, No. 05-CV-1238 (CKK) (dkt. no. 3); Alsawam v. Bush, No. 05-CV-1244 (CKK) (dkt. no. 3); Mohammed v. Bush, No. 05-CV-1347 (GK) (dkt. no. 7); Saib v. Bush, No. 05-CV-1353 (RMC) (Minute Order dated August 1, 2005); Hatim v. Bush, No. 05-CV-1429 (RMU) (dkt. no. 16); Faizullah v. Bush, No. 05-CV-1489 (RMU) (dkt. no. 3); Dhiab v. Bush, No. 05-CV-1457 (GK) (Minute Order dated August 29, 2005).

¹⁷ The Court has the authority to stay proceedings in habeas cases, even prior to the filing of a response. Pursuant to the Rules Governing Section 2254 Cases in the United States District Courts (the “2254 Rules”), which are applicable to petitions for writ of habeas corpus other than those arising under 28 U.S.C. § 2254, such as the petitions in these cases, see 2254 Rule 1(b), a court may extend the deadline for responses to habeas petitions beyond the time limits set forth in 28 U.S.C. § 2243 — the 2254 Rules do not indicate a fixed deadline for responding to habeas petitions, and they supersede the time limits set forth in 28 U.S.C. § 2243. Rule 4 provides that “the judge must order the respondent to file an answer, motion, or other response within a fixed time, or to take other action the judge may order. . . .” See also Bleitner v. Welborn, 15 F.3d 652, 653-54 (7th Cir. 1994) (“[T]he Rules Governing Section 2254 Cases in the United States District Courts, which have the force of a superseding statute, 28 U.S.C. § 2072(b) . . . loosened up the deadline for responses. Rule 4 leaves it up to the district court to fix the deadline.”); Castillo v. Pratt, 162 F. Supp. 2d 575, 577 (N.D. Tex. 2001) (denying § 2241 petitioner’s request for expedited consideration because “[t]he discretion afforded by Rule 4 of the 2254 Rules ‘prevails’ over the strict time limits of 28 U.S.C. § 2243”); Kramer v. Jenkins, 108 F.R.D. 429, 431 (N.D. Ill. 1985) (denying § 2241 petitioner’s motion for correction of court scheduling order because “in the conflict between Rule 4 of the 2254 Rules and 28 U.S.C. § 2243, Rule 4 must prevail”). Furthermore, the 2254 Rules have provided courts with the discretion to consider the burdens involved in filing responses to habeas petitions when implementing case management schedules. See Advisory Committee Notes to 2254 Rules; see also Lonchar v. Thomas, 517 U.S. 314, 325 (1996) (stating that the 2254 Rules confer “ample discretionary authority” on district courts “to tailor the proceedings” in habeas cases). See also Landis v. North American Co., 299

by the opinions in In re Guantanamo Detainee Cases, Khalid, and Boumediene and that are raised in the appeals, including: (1) whether the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and, if so, whether the procedures implemented by respondents to determine the status of petitioners violate their Fifth Amendment rights; (2) whether the petitioners have stated valid claims under the Third Geneva Convention;¹⁸ and (3) whether the petitioners have stated valid claims based on various other legal theories, including other Constitutional provisions, other international treaties, Military regulations, the Administrative Procedure Act, the Alien Tort Statute, and customary international law. It makes no sense for proceedings related to the merits of these cases, such as the submission of factual returns in response to orders to show cause regarding the issuance of a writ of habeas corpus, to go forward when decisions from the D.C. Circuit on the related Guantanamo detainee appeals, which are proceeding in an expedited fashion, will determine the legal analyses applicable to these cases and, indeed, whether and how these cases should proceed. Thus, if the petitions are not dismissed for lack of proper next friend standing, the Court should hold all proceedings in this case in abeyance pending the outcome of the appeals of decisions by Judges of this Court in the other Guantanamo Bay detainee cases.¹⁹

U.S. 248, 254-55 (1936) (“The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”); id. at 256 (noting propriety of stay in cases “of extraordinary public moment”).

¹⁸ See note 14, supra.

¹⁹ In seeking a stay to the extent the next friend petitioners are determined to satisfy the applicable requirements, however, respondents do not intend thereby to block counsel access to properly represented petitioners. To that end, if proper next friend standing is found, respondents would not object to entry of the protective order previously entered in other Guantanamo

CONCLUSION

For the reasons stated, the Court should order petitioners to show cause why these cases should not be dismissed for lack of proper next friend standing. If petitioners are able to establish proper standing, the Court should stay further proceedings in these cases, except as noted above, pending resolution of the appeals of Judge Leon's decision in Khalid and Boumediene and Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases.

Dated: August 31, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Preeya M. Noronha
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG

detainee cases, along with appropriate supplementary orders, to permit such access. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 8, 2004) (attached as Exhibit C); Order Supplementing and Amending Filing Procedures Contained in November 8, 2004 Amended Protective Order in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Dec. 13, 2004) (attached as Exhibit D); Order Addressing Designation Procedures for "Protected Information" in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 10, 2004) (attached as Exhibit E). Respondents' lack of objection to entry of these orders in a properly filed case, however, is without prejudice to their right to challenge any particular terms of these orders in any future proceedings as appropriate.

NICHOLAS J. PATTERSON

ANDREW I. WARDEN

EDWARD H. WHITE

Attorneys

United States Department of Justice

Civil Division, Federal Programs Branch

20 Massachusetts Ave., N.W. Room 7144

Washington, DC 20530

Tel: (202) 514-4107

Fax: (202) 616-8470

Attorneys for Respondents

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOHAMMAD AKHTIAR,
Petitioner,

v.

GEORGE W. BUSH, *et al.*,
Respondents.

)
)
)
)
) Civil Action No. 05-1635 (PLF)
)
)
)
)
)
)

DECLARATION OF RICHARD A. GRIGG

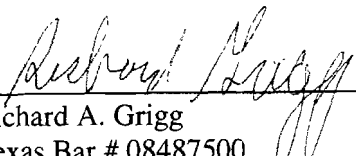
Pursuant to 28 U.S.C. § 1746

Richard A. Grigg declares, under penalty of perjury as follows:

1. I am a partner at the law firm of Spivey & Grigg, LLP, located at 48 East Avenue, Austin, Texas 78701.
2. I am licensed to practice law in the state of Texas and am a member in good standing of the State Bar of Texas and am admitted to practice in all Federal Districts in Texas.
3. My firm has joined with the Center for Constitutional Rights to assist in their continuing efforts to secure representation for all prisoners at Guantánamo.
4. Attorneys with the Center of Constitutional Rights received a communication from a prisoner at Guantanamo that speaks English. This prisoner relayed a request from Mr. Mohammad Akhtiar for legal representation.
5. The Center for Constitutional Rights forwarded the request to me and I agreed to the above representation and filed the above cause of action to comply with this request.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Austin, Texas
August 19, 2005


Richard A. Grigg
Texas Bar # 08487500
SPIVEY & GRIGG, L.L.P.
48 East Avenue
Austin, Texas 78701
Tel: (512) 474-6061
Fax: (512) 474-1605
Email: dicky@Grigg-Law.com
Counsel for Petitioner

DECLARATION OF FRANK SWEIGART

I, Frank Sweigart, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Deputy Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) at U.S. Naval Base Guantanamo Bay, Cuba. I have been in this position since June 2004. In this role I assist OARDEC's Director with all aspects of the mission of OARDEC, which is to conduct Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs). The purpose of the CSRTs is to review relevant and reasonably available information in the government's possession and conduct hearings on detainees under the control of the Department of Defense (DoD) at U.S. Naval Base Guantanamo Bay, Cuba, and to determine whether a detainee continues to meet the criteria for designation as an enemy combatant. The purpose of the ARBs is to review all relevant and reasonably available information on enemy combatants, conduct hearings, and make a recommendation to the Designated Civilian Official, currently the Secretary of the Navy, on whether an enemy combatant should continue to be detained because he is a threat to the United States or its allies or there are other factors bearing upon the need for continued detention such as law enforcement interest or intelligence value.

2. This declaration is provided to explain the steps taken by the Department of Defense (DoD) to notify the detainees at U.S. Naval Base Guantanamo Bay, Cuba, of their right to challenge the legality of their detention by filing *habeas corpus* petitions in federal court. I make these statements based upon my personal knowledge and upon information made available to me in the performance of my official duties.

3. In December 2004 DoD began, on a rolling basis, to notify detainees who had been confirmed to be enemy combatants through the CSRT process that: the CSRT confirmed them to

be enemy combatants; they were now eligible for consideration by an ARB to determine if they still pose a threat to the United States or its allies; and they could file a petition for writ of *habeas corpus* in federal court if they wanted to challenge the lawfulness of their detention. The notification tells the detainees that they have the option of asking a friend, family member, or lawyer to file a petition on their behalf. They are also provided with the address of the United States District Court for the District of Columbia in the event that they choose to submit a *pro se* *habeas* petition. *See* Exhibit A. CSRT proceedings concluded in March 2005. Every detainee confirmed to be an enemy combatant through the CSRT process and who is eligible for consideration by an ARB has received the notice described above.

4. There are presently 14 detainees not eligible for consideration by an ARB because the President of the United States ordered them triable by Military Commission under the Military Order of November 13, 2001. Each of the 14 detainees has been informed that the CSRT determined him to be an enemy combatant and that he can challenge the lawfulness of his detention by filing a petition for a writ of *habeas corpus* in federal court if he wants to do so. These detainees likewise have been provided with the address of the United States District Court for the District of Columbia. *See* Exhibit B.

5. DoD has also notified each detainee whom the CSRT has determined to no longer be an enemy combatant that he can file a petition for writ of *habeas corpus* in federal court if he wants to challenge the lawfulness of his detention. These detainees likewise have been provided with the address of the United States District Court for the District of Columbia. *See* Exhibit C.

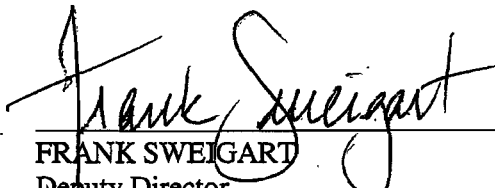
6. DoD is aware of 55 *pro se* petitions written by detainees or, in the case of illiterate detainees, dictated by detainees to an Assisting Military Officer involved in the ARB process.

All of these *pro se* petitions were processed pursuant to the military's standard review procedures for outgoing detainee mail, *see* Declaration of 1LT Wade M. Brown, executed March 17, 2005 (attached hereto as Exhibit D), and were mailed to the District Court.

7. As a result of discussions between DoD and the American Bar Association (ABA), the ABA has agreed to recruit volunteer counsel for *pro se* petitioners and other detainees who may desire representation. DoD is preparing to deliver, within the next few weeks, and on an ongoing basis thereafter, to all *pro se* petitioners who are not already represented by counsel, and to other detainees who request the assistance of counsel, a notification which advises them that the ABA is willing to find them a lawyer to assist them with a petition for writ of *habeas corpus*. The notification provides them with the address of the ABA and a form requesting representation that they may complete and mail to the ABA in the event that they choose to seek the assistance of counsel. *See* Exhibit E.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 31, 2005.


FRANK SWEIGART
Deputy Director
OARDEC

NOTIFICATIONS

1. A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you.
2. An Administrative Review Board (ARB) will now be held to determine whether you still pose a threat to the United States or its allies. The ARB will consider all relevant and reasonably available information. If the ARB decides you no longer pose a threat, you may be released from detention.
3. You may attend the ARB proceeding and present information about yourself to ARB members. If you believe you do not pose a threat to the United States or its allies, we recommend you immediately gather any information that you believe will prove that you are no longer a threat and why you should be released from detention.
4. The ARB will consider written statements from family members or other persons who can explain why you are no longer a threat. You may also present a written or oral statement at the ARB. Unlike the CSRT, witnesses are not allowed to testify during the ARB. An American officer (called an Assisting Military Officer) will help you prepare your case if you want him to. You do not have to attend the ARB, and you do not have to say anything if you do attend. The ARB will be conducted whether or not you choose to attend.
5. In addition, you have been notified that you may challenge your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
6. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions may be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition.

7. Please talk to your Assisting Military Officer if you have any questions about this notification. Your assigned Assisting Military Officer will meet with you later.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT A

NOTIFICATIONS

1. A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you.
2. In addition, you have been notified that you may challenge the lawfulness of your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
3. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions should be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT B

NOTIFICATION

1. You have been notified previously that you may challenge your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
2. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions should be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition or if one is filed by a lawyer, friend or family member on your behalf.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOES 1-570,
Unidentified Detainees
Guantanamo Bay Naval Station
Guantanamo Bay, Cuba,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States, *et al.*,

Respondents.

Civil Action No. 05-CV-0313 (CKK)

DECLARATION OF 1LT WADE M. BROWN

I, Wade M. Brown, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am a First Lieutenant in the New Jersey Army National Guard and am currently serving as the Officer in Charge (OIC) of the S-2 Section within the Joint Detention Operations Group at Guantanamo Bay, Cuba. I have held this position since October 2004. Prior to becoming OIC, I was the Assistant OIC from July 2004 through September 2004. In both of these positions, part of my responsibilities are to report directly to the JTF and JDOG Commanders on all issues related to Detainee Mail operations, to include the proper handling and processing of mail sent to and from detainees, processing times, force protection screening and redaction. I oversee the 15 individuals in the screening and processing units and work in the same building as such. The following statements provide a general overview of the mail privileges available to these detainees at Guantanamo Bay. I make these statements based upon

my personal knowledge and upon information made available to me in the performance of my official duties.

2. Each individual detained by the Department of Defense at Guantanamo Bay is given the opportunity to send and receive mail. Detainees cannot lose mail privileges for any reason, including as part of disciplinary action or interrogation. However, some detainees have affirmatively refused to send or receive any mail. Also, in rare cases, pens are temporarily removed from some detainees when appropriate members of the detainee medical care staff determine the detainee may use the pen to inflict self-harm.

3. In the six-month period from September 2004 through February 2005, the mail processing unit processed approximately 14,000 pieces of mail sent to or by detainees at Guantanamo Bay.

4. There are two methods for detainees to send and receive mail — through the mail delivery and collection system administered by the United States Military, or through the International Committee for the Red Cross (“ICRC”). Legal mail between habeas counsel and the detainees is not processed through either of these two methods, instead that mail is handled under the procedures set forth in the federal court order that covers the habeas cases.

5. The Military provides each detainee with two sheets of stationery, four postcards, and six envelopes per month. See Exhibit A. Each detainee is also provided with a soft pen, although certain detainees are not permitted to keep the pens in their cells for security reasons. These detainees are provided with pens only during the times when they are writing letters. Military officers collect and deliver mail from the detainees approximately six times per month. After mail is collected from the detainees, it is taken to a processing unit. At the processing unit,

each piece of mail is translated into English if necessary, screened for inappropriate materials and redacted accordingly, and placed in a U.S. Postal Service receptacle affixed with the required postage. This entire process takes approximately fourteen days on average. The processing unit clears approximately 75 pieces of mail each day. Mail that is sent to a detainee must also be cleared through the processing unit and stamped "Approved by U.S. Forces" before it can be delivered to the detainee to whom it is addressed. Incoming mail is also typically processed within fourteen days on average.

6. The ICRC also facilitates the delivery of detainee mail to and from Guantanamo Bay. The ICRC pays approximately four visits each year to the detainees for approximately 5-6 weeks per visit. The ICRC provides its own stationery and envelopes to the detainees (although detainees are still required to use Military-issued pens), collects the mail from the detainees, and delivers it to the processing unit. After the mail is cleared by the processing unit, it is returned to the ICRC, who delivers it to the intended recipients. The ICRC also collects mail from outside Guantanamo Bay and delivers the mail directly to the detainees after it is cleared through the processing unit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2005.



WADE M. BROWN
First Lieutenant, NJARNG

EXHIBIT A

EXHIBIT D

Country where posted _____
Name of Camp _____
Date and Place of Birth _____
Internment Serial Number _____
Name (Last, first MI) _____
SENDER: _____
(Fold on this line)

MAIL

LETTER

Language _____

To _____

Street _____

City _____

Country _____

Province or Department _____

(Fold on this line)

DO NOT WRITE HERE

(Fold on this line)

FORM 2667-R, May 82

EDITION OF 1 JUL 63 IS OBSOLETE

For use of this form, see the proponent agency is DCSPER.

EXHIBIT D

DO NOT WRITE BEYOND HEAVY LINES

Reverse of DA FORM 2687-R, May 82

EXHIBIT D

DETAINEE CAMP DELTA Washington, DC 20353 USA	
SENDER	TO:
NAME (Last, first, MI)	
INTERMENT SERAL NUMBER	STREET
DATE AND PLACE OF BIRTH	CITY
NAME OF CAMP	COUNTRY
	PROVINCE OR DEPARTMENT
COUNTRY WHERE POSTED	

DA FORM 2668, JAN 2004

Replaces DA Form 2668-R, May 1982, which is

APD V1.01

POST CARD For use of this form, see AR 190-8; the proponent agency is PMG.		DATE
LANGUAGE	POWER SERVED	
WRITE BETWEEN LINES AND AS LEGIBLY AS POSSIBLE		

DA FORM 2668, JAN 2004

APD V1.01

EXHIBIT D

DETAINEE
CAMP DELTA
Washington, DC 20353
USA

EXHIBIT D

NOTIFICATION

1. You have been notified previously that you may challenge your detention in a United States court by asking a civilian judge to look at the lawfulness of your detention through a process called a *petition for writ of habeas corpus*. You were told that such a petition could be filed for you, or you could ask a family member, friend, or lawyer to file one for you.

2. Should you desire the assistance of a lawyer in filing a petition or in helping with a petition you have already sent on your own to the court, the American Bar Association, the world's largest association of lawyers, will find an experienced, independent civilian lawyer to help you without any fee or payment. The lawyer they find will represent your interests and will zealously assert your case before the civilian court.

3. If you would like the assistance of such a lawyer, you can fill out the attached form and send it to the following address:

Robert D. Evans, Esquire
American Bar Association
740 15th Street, N.W.
Washington, D.C. 20005

Arrangements will then be made for the lawyer to consult with you and represent your interests in the civilian court. The lawyer's job will be to assist you. The lawyer will not work for the military or the government.

4. If you are unable to write, you will receive assistance in filling out the form. Your words will be put on the form.

EXHIBIT E

I, _____, wish to
(write name)

have a civilian lawyer represent me and assist me with a Petition for
Writ of Habeas Corpus in the civilian courts of the United States. I
request that the American Bar Association find a lawyer who will
represent my best interests.

I am a citizen of the country of _____.

I speak the following language(s): _____

Signed: _____
(sign name)

Date: _____

EXHIBIT E

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

	)	Civil Action Nos.
	)	02-CV-0299 (CKK), 02-CV-0828 (CKK),
	)	02-CV-1130 (CKK), 04-CV-1135 (ESH),
	)	04-CV-1136 (JDB), 04-CV-1137 (RMC),
<i>In re Guantanamo Detainee Cases</i>	)	04-CV-1142 (RJL), 04-CV-1144 (RWR),
	)	04-CV-1164 (RBW), 04-CV-1166 (RJL),
	)	04-CV-1194 (HHK), 04-CV-1227 (RBW),
	)	04-CV-1254 (HHK), 04-CV-1519 (JR)

**AMENDED PROTECTIVE ORDER AND PROCEDURES FOR COUNSEL ACCESS
TO DETAINEES AT THE UNITED STATES NAVAL BASE
IN GUANTANAMO BAY, CUBA**

This matter comes before the Court upon Respondents' Motion for Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or are otherwise in the possession of, the petitioners and/or petitioners' counsel in these coordinated cases. Pursuant to the general supervisory authority of the Court, in order to protect the national security, and for good cause shown,

IT IS ORDERED:

1. The Court finds that these cases involve classified national security information or documents, the storage, handling and control of which require special security precautions, and access to which requires a security clearance and a "need to know." These cases may also involve other protected information or documents, the storage, handling and control of which may require special precautions in order to protect the security of United States government personnel and facilities, and other significant government interests.
2. The purpose of this Protective Order is to establish the procedures that must be followed by all petitioners' counsel, their respective petitioner(s), all other counsel involved in

these cases, translators for the parties, and all other individuals who receive access to classified national security information or documents, or other protected information or documents, in connection with these cases, including the privilege team as defined in Exhibit A.

3. The procedures set forth in this Protective Order will apply to all aspects of these cases, and may be modified by further order of the Court *sua sponte* or upon application by any party. The Court will retain continuing jurisdiction to enforce or modify the terms of this Order.

4. Nothing in this Order is intended to or does preclude the use of classified information by the government as otherwise authorized by law outside of these actions.

5. Petitioners' counsel shall be responsible for advising their employees, the petitioners, and others of the contents of this Protective Order, as appropriate or needed.

6. Petitioners' counsel are bound by the terms and conditions set forth in the "Revised Procedures For Counsel Access To Detainees At the U.S. Naval Base In Guantanamo Bay, Cuba," and the procedures for handling mail and documents brought into and out of counsel meetings, attached hereto as Exhibit A. This Protective Order specifically incorporates by reference all terms and conditions established in the procedures contained in Exhibit A to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information. Any violation of the terms and conditions of those procedures will also be deemed a violation of this Protective Order. This paragraph does not apply with respect to provisions in the procedures contained in Exhibit A that are or have been overridden by the Court.

7. The privilege team shall not disclose to any person any information provided by counsel for a petitioner or by a petitioner, other than information provided in a filing with the Court, unless such information, if it were monitored information, could be disclosed under Section X of Exhibit A. Such disclosure shall be consistent with the provisions of Section X of Exhibit A.

Definitions

8. As used herein, the words “documents” or “information” shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), and further include, but are not limited to:

a. papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, interoffice and intra-office communications, notations of any sort concerning conversations, meetings, or other communications, bulletins, teletypes, telegrams, telefacsimiles, invoices, worksheets, and drafts, alterations, modifications, changes and amendments of any kind to the foregoing;

b. graphic or oral records or representations of any kind, including, but not limited to, photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind, and motion pictures;

c. electronic, mechanical or electric records of any kind, including, but not limited to, tapes, cassettes, disks, recordings, electronic mail, films, typewriter ribbons, word processing or other computer tapes or disks, and all manner of electronic data processing storage; and

d. information acquired orally.

9. The terms “classified national security information and/or documents,” “classified information” and “classified documents” refer to:

a. any classified document or information that has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as “CONFIDENTIAL,” “SECRET,” or “TOP SECRET,” or additionally controlled as “SENSITIVE

COMPARTMENTED INFORMATION (SCI),” or any classified information contained in such document;

b. any document or information, regardless of its physical form or characteristics, now or formerly in the possession of a private party that has been derived from United States government information that was classified, regardless of whether such document or information has subsequently been classified by the government pursuant to Executive Order, including Executive Order 12958, as amended, or its predecessor Orders as “CONFIDENTIAL,” “SECRET,” or “TOP SECRET,” or additionally controlled as “SENSITIVE COMPARTMENTED INFORMATION (SCI)”;

c. verbal or non-documentary classified information known to the petitioner or petitioners’ counsel; or

d. any document and information as to which the petitioner or petitioners’ counsel have been notified orally or in writing that such documents or information contains classified information.

10. All classified documents, and information contained therein, shall remain classified unless the documents bear a clear indication that they have been declassified by the agency or department that is the original classification authority of the document or the information contained therein (hereinafter, the “original classification authority”).

11. The terms “protected information and/or documents,” “protected information” and “protected documents” refer to any document or information deemed by the Court, either upon application by counsel or *sua sponte*, as worthy of special treatment as if the document or information were classified, even if the document or information has not been formally deemed to be classified.

12. For purposes of this Protective Order, “petitioners’ counsel” shall be defined to include an attorney who is employed or retained by or on behalf of a petitioner for purposes of

representing the petitioner in habeas corpus or other litigation in federal court in the United States, as well as co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

13. “Access to classified information” or “access to protected information” shall mean having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information or protected information.

14. “Secure area” shall mean a physical facility accredited or approved for the storage, handling, and control of classified information.

15. “Unauthorized disclosure of classified information” shall mean any knowing, willful or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient.

Designation of Court Security Officer

16. The Court designates Christine E. Gunning as Court Security Officer for these cases, and Joan B. Kendrall, Michael P. Macisso, James P. Londergan, Mary M. Cradlin, Daniel O. Hartenstine, John P. Molinard, Jennifer Campbell, and Barbara J. Russell as Alternate Court Security Officers, for the purpose of providing security arrangements necessary to protect from unauthorized disclosure of any classified documents or information, or protected documents or information, to be made available in connection with these cases. Petitioners’ counsel shall seek guidance from the Court Security Officer with regard to appropriate storage, handling, transmittal, and use of classified documents or information.

Access to Classified Information and Documents

17. Without authorization from the government, no petitioner or petitioners' counsel shall have access to any classified information involved in these cases unless that person shall first have:

- a. made a written submission to the Court Security Officer precisely stating the reasons why counsel has a need to know the classified information requested; and
- b. received the necessary security clearance as determined by the Department of Justice Security Officer; and
- c. signed the Memorandum of Understanding ("MOU"), attached hereto as Exhibit B, agreeing to comply with the terms of this Protective Order.

The written submissions that are made by counsel to the Court Security Officer stating the reasons why counsel has a need to know the classified information requested shall be kept confidential by the Court Security Officer and shall not be disclosed to any other counsel or party to these cases unless the Court specifically orders such disclosure.

18. Petitioners' counsel to be provided access to classified information shall execute the MOU appended to this Protective Order, and shall file executed originals with the Court and submit copies to the Court Security Officer and counsel for the government. The execution and submission of the MOU is a condition precedent for petitioners' counsel to have access to, or continued access to, classified information for the purposes of this proceeding.

19. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the MOU executed in connection with this Order.

20. The government shall arrange for one appropriately approved secure area for the use of petitioners' counsel. The secure area shall contain a working area that will be supplied with secure office equipment reasonable and necessary to the preparation of the petitioners' case. Expenses for the secure area and its equipment shall be borne by the government.

21. The Court Security Officer shall establish procedures to ensure that the secure area is accessible to the petitioners' counsel during normal business hours and at other times on reasonable request as approved by the Court Security Officer. The Court Security Officer shall establish procedures to ensure that the secure area may be maintained and operated in the most efficient manner consistent with the protection of classified information. The Court Security Officer or Court Security Officer designee may place reasonable and necessary restrictions on the schedule of use of the secure area in order to accommodate appropriate access to all petitioners' counsel in this and other proceedings.

22. All classified information provided by the government to counsel for petitioners, and all classified information otherwise possessed or maintained by petitioners' counsel, shall be stored, maintained, and used only in the secure area.

23. No documents containing classified information may be removed from the secure area unless authorized by the Court Security Officer or Court Security Officer designee supervising the area.

24. Consistent with other provisions of this Protective Order, petitioners' counsel shall have access to the classified information made available to them in the secure area, and shall be allowed to take notes and prepare documents with respect to those materials.

25. Petitioners' counsel shall not copy or reproduce any classified information in any form, except with the approval of the Court Security Officer or in accordance with the procedures established by the Court Security Officer for the operation of the secure area.

26. All documents prepared by petitioners or petitioners' counsel that do or may contain classified information (including without limitation, notes taken or memoranda prepared by counsel and pleadings or other documents intended for filing with the Court) shall be transcribed, recorded, typed, duplicated, copied, or otherwise prepared only by persons who have received an appropriate approval for access to classified information. Such activities shall take place in the secure area on approved word processing equipment and in accordance with the procedures approved by the Court Security Officer. All such documents and any associated materials containing classified information (such as notes, memoranda, drafts, copies, typewriter ribbons, magnetic recordings, exhibits) shall be maintained in the secure area unless and until the Court Security Officer advises that those documents or associated materials are unclassified in their entirety. None of these materials shall be disclosed to counsel for the government unless authorized by the Court, by petitioners' counsel or as otherwise provided in this Protective Order.

27. Petitioners' counsel shall discuss classified information only within the secure area or in another area authorized by the Court Security Officer, shall not discuss classified information over any standard commercial telephone instrument or office intercommunication system, and shall not transmit or discuss classified information in electronic mail communications of any kind.

28. The Court Security Officer or Court Security Officer designee shall not reveal to any person the content of any conversations she or he may hear by or among petitioners' counsel, nor reveal the nature of documents being reviewed by them, or the work generated by them, except as necessary to report violations of this Protective Order to the Court or to carry out their duties pursuant to this Order. In addition, the presence of the Court Security Officer or Court Security Officer designee shall not operate as a waiver of, limit, or otherwise render inapplicable, the attorney-client privilege or work product protections.

29. Petitioners' counsel shall not disclose the contents of any classified documents or information to any person, including counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, and counsel for the government with the appropriate clearances and the need to know that information. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly in her well-reasoned opinion addressing counsel access procedures regarding petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these cases are presumed to have a "need to know" information both in their own cases and in related cases pending before this Court. Therefore, and except as provided with respect to the three petitioners in Al Odah mentioned above, counsel for all petitioners in these cases who have satisfied all necessary prerequisites and follow all procedures set forth herein may share and discuss among themselves classified information to the extent necessary for the effective representation of their clients. Counsel for respondents may challenge the "need to know" presumption on a case-by-case basis for good cause shown.

30. Petitioners' counsel shall not disclose classified information not provided by petitioner-detainee to that petitioner-detainee. Should petitioners' counsel desire to disclose classified information not provided by petitioner-detainee to that petitioner-detainee, petitioners' counsel will provide in writing to the privilege review team (See Exhibit A) a request for release clearly stating the classified information they seek to release. The privilege review team will forward the petitioner counsel's request to the appropriate government agency authorized to declassify the classified information for a determination. The privilege review team will inform petitioners' counsel of the determination once it is made.

31. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be classified in connection with any hearing or proceeding in these cases except as otherwise provided herein.

32. Except as otherwise stated in this paragraph and to ensure the security of the United States of America, at no time, including any period subsequent to the conclusion of the proceedings, shall petitioners' counsel make any public or private statements disclosing any classified information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are classified. In the event that classified information enters the public domain, however, counsel is not precluded from making private or public statements about the information already in the public domain, but only to the extent that the information is in fact in the public domain. Counsel may not make any public or private statements revealing personal knowledge from non-public sources regarding the classified or protected status of the information or disclosing that counsel had personal access to classified or protected information confirming, contradicting, or otherwise relating to the information already in the public domain. In an abundance of caution and to help ensure clarity on this matter, the Court emphasizes that counsel shall not be the source of any classified or protected information entering the public domain.

As stated in more detail in paragraph 49 below, failure to comply with these rules may result in the revocation of counsel's security clearance as well as civil and/or criminal liability.

33. The foregoing shall not prohibit petitioners' counsel from citing or repeating information in the public domain that petitioners' counsel does not know to be classified information or a classified document, or derived from classified information or a classified document.

34. All documents containing classified information prepared, possessed or maintained by, or provided to, petitioners' counsel (except filings submitted to the Court and

served on counsel for the government), shall remain at all times in the control of the Court Security Officer for the duration of these cases. Upon final resolution of these cases, including all appeals, all such documents shall be destroyed by the Court Security Officer.

Access to Protected Information and Documents

35. Without authorization from the government or the Court, protected information shall not be disclosed or distributed to any person or entity other than the following:

- a. petitioners' counsel, provided such individuals have signed the Acknowledgment, attached hereto as Exhibit C, attesting to the fact that they have read this Protective Order and agree to be bound by its terms; and
- b. the Court and its support personnel.

36. The execution of the Acknowledgment is a condition precedent for petitioners' counsel to have access to, or continued access to, protected information for the purposes of this proceeding. A copy of each executed Acknowledgment shall be kept by counsel making the disclosure until thirty (30) days after the termination of this action, including appeals.

37. The substitution, departure, or removal of petitioners' counsel from these cases for any reason shall not release that person from the provisions of this Protective Order or the Acknowledgment executed in connection with this Protective Order.

38. Petitioners' counsel shall not disclose the contents of any protected documents or information to any person, to include counsel in related cases brought by Guantanamo Bay detainees in this or other courts, except those authorized pursuant to this Protective Order, the Court, or counsel for the government. Except as otherwise specifically provided by Judge Colleen Kollar-Kotelly with respect to counsel for petitioners Mohammed Ahmed al Kandari, Fawzi Khalid Abdullah Fahad al Odah, and Khalid Abdullah Mishal al Mutairi in Al Odah v. United States, 02-CV-0828 (CKK), counsel for petitioners in these coordinated cases may share protected information with each other but only to the extent that counsel have appropriate

security clearances and that all other procedures set forth in this Protective Order are complied with. Petitioners' counsel shall maintain all protected information and documents received through this proceeding in a confidential manner.

39. Petitioners' counsel shall not disclose protected information not provided by petitioner-detainee to that petitioner-detainee without prior concurrence of counsel for the government or express permission of the Court.

40. No petitioner or counsel for petitioner shall disclose or cause to be disclosed any information known or believed to be protected in connection with any hearing or proceeding in these cases except as otherwise provided herein.

41. At no time, including any period subsequent to the conclusion of the proceedings, will petitioners' counsel make any public or private statements disclosing any protected information or documents accessed pursuant to this Protective Order, including the fact that any such information or documents are protected.

42. Protected information shall be used only for purposes directly related to these cases and not for any other litigation or proceeding, except by leave of the Court. Photocopies of documents containing such information shall be made only to the extent necessary to facilitate the permitted use hereunder.

43. Nothing in this Protective Order shall prevent the government from using for any purpose protected information it provides a party. Nothing in this Protective Order shall entitle another party to protected information.

44. Supplying protected information to another party does not waive privilege with respect to any person or use outside that permitted by this Protective Order.

45. Within sixty (60) days of the resolution of these actions, and the termination of any appeals therefrom, all protected documents or information, and any copies thereof, shall be promptly destroyed, provided that the party to whom protected information is disclosed certifies

in writing that all designated documents and materials have been destroyed, and further provided that counsel for the government may retain one complete set of any such materials that were presented in any form to the Court. Any such retained materials shall be placed in an envelope or envelopes marked "Protected Information Subject to Protective Order." In any subsequent or collateral proceeding, a party may seek discovery of such materials from the government, without prejudice to the government's right to oppose such discovery or its ability to dispose of the materials pursuant to its general document retention policies.

Procedures for Filing Documents

46. Until further order of this Court, any pleadings or other document filed by a petitioner shall be filed under seal with the Court through the Court Security Officer unless the petitioner has obtained from the Court Security Officer permission, specific to a particular, non-substantive pleading or document (e.g., motions for extensions of time, continuances, scheduling matters, etc.) not containing information that is or may be classified or protected, to file the pleading or document not under seal. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall promptly examine the pleading or document and forward it to the appropriate agencies for their determination whether the pleading or document contains classified information. If it is determined that the pleading or document contains classified information, the Court Security Officer shall ensure that portion of the document, and only that portion, is marked with the appropriate classification marking and that the document remains under seal. If it is determined that the pleading or document contains protected information, the Court Security Officer shall ensure that portion of the document, and only that portion, remains under seal. Any document filed by petitioner that is determined not to contain classified information or protected information, and is not subject to any other restrictions on disclosure, shall immediately be unsealed by the Court Security Officer and placed in the public record. The Court Security

Officer shall immediately deliver under seal to the Court and counsel for the government any pleading or document to be filed by petitioners that contains classified information or protected information. The Court shall then direct the clerk to enter on the docket sheet the title of the pleading or document, the date it was filed, and the fact that it has been filed under seal with the Court Security Officer.

47. Any pleading or other document filed by the government containing classified information shall be filed under seal with the Court through the Court Security Officer. The date and time of physical submission to the Court Security Officer shall be considered the date and time of filing with the Court. The Court Security Officer shall serve a copy of any classified pleadings by the government upon the Petitioner at the secure facility.

48. Nothing herein shall require the government to disclose classified or protected information. Nor shall anything herein prohibit the government from submitting classified information or protected information to the Court *in camera* or *ex parte* in these proceedings, or entitle petitioners or petitioners' counsel access to such submissions or information. Except for good cause shown in the filing, the government shall provide counsel for the petitioner or petitioners with notice served on such counsel on the date of the filing.

Penalties for Unauthorized Disclosure

49. Any unauthorized disclosure of classified information may constitute violations of United States criminal laws. In addition, any violation of the terms of this Protective Order shall be immediately brought to the attention of the Court and may result in a charge of contempt of Court and possible referral for criminal prosecution. See e.g., Executive Order 12958, as amended. Any breach of this Protective Order may also result in the termination of access to classified information and protected information. Persons subject to this Protective Order are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of classified documents or information could cause damage to the national security of the United

States or may be used to the advantage of an adversary of the United States or against the interests of the United States. Persons subject to this Protective Order are also advised that direct or indirect unauthorized disclosure, retention, or negligent handling of protected documents or information could risk the security of United States government personnel and facilities, and other significant government interests. This Protective Order is to ensure that those authorized to receive classified information and protected information will not divulge this information to anyone who is not authorized to receive it, without prior written authorization from the original classification authority and in conformity with this Protective Order.

50. The termination of these proceedings shall not relieve any person or party provided classified information or protected information of his, her, or its obligations under this Protective Order.

IT IS SO ORDERED.

November 8, 2004

/s/

JOYCE HENS GREEN
United States District Judge

Exhibit A

EXHIBIT A

**REVISED PROCEDURES FOR COUNSEL ACCESS TO DETAINEES
AT THE U.S. NAVAL BASE IN GUANTANAMO BAY, CUBA**

I. Applicability

Except as otherwise stated herein or by other Order issued in the United States District Court for the District of Columbia, the following procedures shall govern counsel access to all detainees in the control of the Department of Defense ("DoD") at the U.S. Naval Base in Guantanamo Bay, Cuba ("GTMO") by counsel for purposes of litigating the cases in which this Order is issued.

These procedures do not apply to counsel who are retained solely to assist in the defense of a detainee in a trial by military commission. Access by that counsel is covered by the Procedures for Monitoring Communications Between Detainees Subject to Trial by Military Commission and their Defense Counsel Pursuant to Military Commission Order No. 3.

II. Definitions

A. Communications: All forms of communication between counsel and a detainee, including oral, written, electronic, or by any other means.

B. Counsel: An attorney who is employed or retained by or on behalf of a detainee for purposes of representing the detainee in the United States District Court for the District of Columbia and who is admitted, either generally or pro hac vice, in this Court. Unless otherwise stated, "counsel" also includes co-counsel, interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation.

C. Detainee: An individual detained by DoD as an alleged enemy combatant at the U.S. Naval Base in Guantanamo Bay, Cuba.

D. Privilege Team: A team comprised of one or more DoD attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and, in the future, will not take part in, any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee. If required, the privilege team may include interpreters/translators, provided that such personnel meet these same criteria.

E. Legal Mail: Letters written between counsel and a detainee that are related to the counsel's representation of the detainee, as well as privileged documents and publicly-filed legal documents relating to that representation.

EXHIBIT A

III. Requirements for Access to and Communication with Detainees

A. Security Clearance:

1. Counsel must hold a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel).
2. Counsel who possess a valid security clearance shall provide, in writing, the date of their background investigation, the date such clearance was granted, the level of the clearance, and the agency who granted the clearance. Access will be granted only after DoD verification of the security clearance.
3. Counsel who does not currently possess a Secret clearance will be required to submit to an application for clearance to the Department of Justice, Litigation Security Division.

B. Acknowledgment of and Compliance with Access Procedures

1. Before being granted access to the detainee, counsel will receive a copy of these procedures. To have access to the detainee, counsel must agree to comply fully with these procedures and must sign an affirmation acknowledging his/her agreement to comply with them.
2. This affirmation will not be considered an acknowledgment by counsel that the procedures are legally permissible. Even if counsel elects to challenge these procedures, counsel may not knowingly disobey an obligation imposed by these procedures.
3. The DoD expects that counsel, counsel's staff, and anyone acting on the behalf of the attorney will fully abide by the requirements of this document. Counsel is required to provide the DoD with signed affirmations from interpreters, translators, paralegals, investigators and all other personnel or support staff employed or engaged to assist in the litigation, upon utilization of those individuals by counsel in a manner that implicates these procedures.
4. Should counsel fail to comply with the procedures set forth in this document, access to or communication with the detainee will not be permitted.

C. Verification of Representation

1. Prior to being permitted access to the detainee, counsel must provide DoD with a *Notification of Representation*. This Notification must include the counsel's licensing information, business and email addresses and phone number, as well as

EXHIBIT A

the name of the detainee being represented by the counsel. Additionally, counsel shall provide evidence of his or her authority to represent the detainee.

2. Counsel shall provide evidence of his or her authority to represent the detainee as soon as practicable and in any event no later than ten (10) days after the conclusion of a second visit with the detainee. The Court recognizes that counsel may not be in a position to present such evidence after the initial meeting with a detainee. Counsel for detainees and counsel for respondents shall cooperate to the fullest extent possible to reach a reasonable agreement on the number of counsel visits allowed. Should counsel for a detainee believe that the government is unreasonably limiting the number of visits with a detainee, counsel may petition the Court at the appropriate time for relief.
3. If the counsel withdraws from representation of the detainee or if the representation is otherwise terminated, counsel is required to inform DoD immediately of that change in circumstances.
4. Counsel must provide DoD with a signed representation stating that to the best of counsel's knowledge after reasonable inquiry, the source of funds to pay counsel any fees or reimbursement of expenses are not funded directly or indirectly by persons or entities the counsel believes are connected to terrorism or the product of terrorist activities, including "Specially Designated Global Terrorists," identified pursuant to Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001) or Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995), and (b) counsel has complied with ABA Model Rule 1.8(f).

D. Logistics of Counsel Visits

1. Counsel shall submit to the Department of Justice (DoJ) any request to meet with a detainee. This request shall specify date(s) of availability for the meeting, the desired duration of the meeting and the language that will be utilized during the meeting with the detainee. Reasonable efforts will be made to accommodate the counsel's request regarding the scheduling of a meeting. Once the request has been approved, DoJ will contact counsel with the date and duration of the meeting.
2. Legal visits shall take place in a room designated by JTF-Guantanamo. No more than two attorneys (or one attorney and one assistant) plus one interpreter/translator shall visit with a detainee at one time, unless approved in advance by the Commander, JTF-Guantanamo. Such approval shall not be unreasonably withheld.
3. Due to the mission and location of the US Naval Base at Guantanamo Bay, Cuba, certain logistical details will need to be coordinated by counsel prior to arrival. This includes arrangements for travel and lodging. Specific information regarding these issues will be provided by DoJ.

EXHIBIT A

4. In order to travel to GTMO, all counsel must have a country and theater clearance for that specific visit. In order to begin processing country and theater clearances, counsel must have confirmed flight information for travel to GTMO and a valid current United States security clearance at the Secret level or higher, or its equivalent (as determined by appropriate DoD intelligence personnel). Country and theater clearances require twenty (20) days to process. Accordingly, counsel shall provide DoD, through DoJ, with the required information no later than 20 days prior to the GTMO visit date, or as soon as a visit is scheduled. Requests for visits made inside of 20 days will not normally be granted.

IV. Procedures for Correspondence Between Counsel and Detainee

A. Mail Sent by Counsel to Detainee ("Incoming Mail")

1. Counsel shall send incoming legal mail for a detainee to the privilege team at the appropriate address provided by government counsel. Each envelope or mailer shall be labeled with the name of the detainee and shall include a return address for counsel sending the materials. The outside of the envelope or mailer for incoming legal mail shall be labeled clearly with the following annotation: "Attorney-Detainee Materials-For Mail Delivery to Detainee."
2. Each page of legal mail shall be labeled "Attorney-Detainee Materials." No staples, paper clips or any non-paper items shall be included with the documents.
3. Upon receiving legal mail from counsel for delivery to the detainee, the privilege team shall open the envelope or mailer to search the contents for prohibited physical contraband. Within two (2) business days of receipt of legal mail, and assuming no physical contraband is present, the privilege team shall forward the mail to military personnel at GTMO in a sealed envelope marked "Legal Mail Approved by Privilege Team" and clearly indicating the identity of the detainee to which the legal mail is to be delivered. The privilege team shall return to the sender any incoming mail that does not comply with the terms of paragraphs IV.A.1., 2.
4. Within two (2) business days of receipt of legal mail from the privilege team, personnel at GTMO shall deliver the envelope or mailer marked by the privilege team as "Legal Mail Approved by the Privilege Team" to the detainee without opening the envelope or mailer. If counsel desires confirmation that the documents were delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope for that purpose. The detainee shall be responsible for mailing any confirmation of delivery to counsel as outgoing legal mail. This method shall be the sole and exclusive means by which confirmation of delivery is provided to counsel.

EXHIBIT A

5. Written correspondence to a detainee not falling within the definition of legal mail shall be sent through the United States Postal Service to the appropriate address provided by government counsel. Non-legal mail includes, but is not limited to, letters from persons other than counsel, including family and friends of the detainee. These non-privileged communications will be reviewed by military personnel at GTMO under the standard operating procedures for detainee non-legal mail.
6. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise by the privilege team or by this Court or another court. Accordingly, if a counsel's correspondence contains any summary or recitation of or reference to a communication with a detainee that has not been previously determined to be unclassified, the correspondence shall be prepared, marked, transported and handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information and Security Supplement to DOD Regulation 5200.1R.
7. Written and oral communications with a detainee, including all incoming legal mail, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

B. Mail Sent by Detainee to Counsel ("Outgoing Mail")

1. Detainees will be provided with paper to prepare communications to counsel. In the presence of military personnel, the detainee will seal the written communication into an envelope and it will be annotated as "Attorney-Detainee Materials-For Mail Delivery To Counsel." Each envelope shall be labeled with the name of the detainee and the counsel. Envelopes annotated with the name of persons other than the detainee's counsel (including family/friends or other attorneys) shall be processed according to the standard operating procedures for detainee non-legal mail.
2. Military personnel will collect the outgoing legal mail within one (1) business day of being notified by the detainee that the communication is prepared for sealing and mailing.
3. After the outgoing legal mail is collected from the detainee, the envelope will be sealed into a larger envelope by military personnel at Guantanamo which will be marked as "Attorney-Detainee Materials-For Mail Delivery To Counsel" and will

EXHIBIT A

be annotated with the name of the detainee and the counsel. The envelope will be sealed and mailed in the manner required for classified materials. Within two (2) business days of receipt from the detainee, the communication will be mailed to the appropriate address as provided by government counsel.

4. Detainees also are permitted to send non-legal mail, including written communications to persons other than counsel, through the United States Postal Service. These communications shall be reviewed by military personnel at Guantanamo under the standard operating procedures for detainee non-legal mail.
5. In the event any non-legal correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) are sent to counsel as, or included with, legal mail, counsel shall return the documents to military personnel at GTMO for processing according to the standard operating procedures for detainee non-legal mail.

V. Materials Brought Into A Meeting With Detainee And Counsel

- A. Counsel shall bring only legal mail, writing utensils and paper into any meeting with a detainee unless counsel has received prior approval from the Commander, JTF-GTMO. The Commander shall not unreasonably withhold approval for counsel to bring into a meeting with a detainee letters, tapes, or other communications introducing counsel to the detainee, if the government has first reviewed the communication and determined that sharing the communication with the detainee would not threaten the security of the United States.
- B. Written and oral communications with a detainee, including all documents brought into a meeting with a detainee, shall not include information relating to any ongoing or completed military, intelligence, security, or law enforcement operations, investigations, or arrests, or the results of such activities, by any nation or agency or current political events in any country that are not directly related to counsel's representation of that detainee; or security procedures at GTMO (including names of U.S. Government personnel and the layout of camp facilities) or the status of other detainees, not directly related to counsel's representation.

VI. Materials Brought Out Of A Meeting With Detainee and Counsel

- A. Upon the completion of each meeting with a detainee or during any break in a meeting session, counsel will give the notes or documents used or produced during the meeting to a designated individual at Guantanamo. These materials will be sealed in the presence of counsel and will be handled as classified material as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.
- B. Upon the completion of the counsel's visit to Guantanamo, the notes or documents used or produced during the visit shall be sealed in the presence of

EXHIBIT A

counsel and placed in an envelope labeled as “Attorney-Detainee Meeting Documents-For Delivery to Counsel.” The envelope shall be sealed into a larger envelope by military personnel at Guantanamo which shall be marked as “Attorney-Detainee Meeting Documents-For Mail Delivery To Counsel” and shall be annotated with the name of the detainee and the counsel. The envelope shall be sealed and mailed in the manner required for classified materials. Within two (2) business days following the completion of the counsel’s visit to Guantanamo, the package shall be mailed to the appropriate address provided by government counsel.

- C. Correspondence or messages from a detainee to individuals other than his counsel (including family/friends or other attorneys) shall not be handled through this process. If a detainee provides these communications to his counsel during a visit, counsel shall give those communications to military personnel at Guantanamo so they can be processed under the standard operating procedures for detainee non-legal mail.

VII. Classification Determination of Detainee Communications

- A. Counsel may submit information learned from a detainee to the privilege team for a determination of its appropriate security classification. Counsel shall memorialize the information submitted for classification review into a written memorandum outlining as specifically as possible the information for which counsel requests a classification determination. All documents submitted for classification review shall be prepared, handled and treated in the manner required for classified materials, as provided by as required by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R. No information derived from these submissions shall be disclosed outside the privilege team pursuant to these procedures until after the privilege team has reviewed it for security and intelligence purposes. Absent express consent given by the Court, or except as otherwise provided in this document, the submissions shall not be disclosed to any person involved in the interrogation of a detainee, and no such individual may make any use of those communications whatsoever, nor shall the submissions be disclosed to any Government personnel involved in any domestic or foreign court, military commission or combatant status tribunal proceedings involving the detainee.
- B. Counsel shall send all materials submitted for classification review to the appropriate address to be provided by government counsel. The outside of the envelope or mailer shall be clearly labeled “Attorney-Detainee Meeting Documents-For Classification Review By Privilege Team.” Each envelope or mailer shall be annotated with the name of the detainee and the counsel. Each page of the document submitted for classification review shall be marked “Attorney-Detainee Materials” and “Classified.” The envelope or mailer will be sealed and mailed in the manner required for classified materials.

EXHIBIT A

- C. As soon as possible after conducting the classification review, the privilege team shall advise counsel of the classification levels of the information contained in the materials submitted for review. The privilege team shall forward its classification determination directly to counsel after a review and analysis period not to exceed, from the time of receipt by the privilege team:
 - 1. Seven (7) business days for information that is written in the English language;
 - 2. Fourteen (14) business days for any information that includes writing in any language other than English, to allow for translations by the privilege team;
 - 3. Twenty (20) business days for any information where the privilege team has reason to believe that a code was used, to allow for further analysis.
- D. While conducting classification review, the privilege team shall promptly report any information that reasonably could be expected to result in immediate and substantial harm to the national security to the Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials as appropriate.
- E. If, at any time, the privilege team determines that information in the documents submitted for classification review relate to imminent acts of violence, the privilege team shall report the contents of those documents to Commander, JTF-Guantanamo. In his discretion, the Commander, JTF-Guantanamo may disseminate the relevant portions of the information to law enforcement, military and intelligence officials.
- F. The privilege team shall not disclose any information submitted by counsel for classification review outside the privilege team, except as provided by these procedures or as permitted by counsel submitting the information.

VIII. Telephonic Access to Detainee

- A. Requests for telephonic access to the detainee by counsel or other persons will not normally be approved. Such requests may be considered on a case-by-case basis due to special circumstances and must be submitted to Commander, JTF-Guantanamo.
- B. Any telephonic access by counsel will be subject to appropriate security procedures, but shall not include contemporaneous monitoring or recording.
- C. Any telephonic access by persons other than counsel will be subject to appropriate security procedures, including contemporaneous monitoring and recording.

EXHIBIT A

IX. Counsel's Handling And Dissemination Of Information From Detainee

- A. Subject to the terms of any applicable protective order, counsel may disseminate the unclassified contents of the detainee's communications for purposes reasonably related to their representation of that detainee.
- B. Counsel is required to treat all information learned from a detainee, including any oral and written communications with a detainee, as classified information, unless and until the information is submitted to the privilege team and determined to be otherwise. All classified material must be handled, transported and stored in a secure manner, as provided by Executive Order 12958, DOD Regulation 5200.1-R and AI 26, OSD Information Security Supplement to DOD Regulation 5200.1R.
- C. Counsel shall disclose to DoJ or Commander, JTF-Guantanamo any information learned from a detainee involving future events that threaten national security or involve imminent violence.
- D. Counsel may not divulge classified information not learned from the detainee to the detainee. Counsel may not otherwise divulge classified information related to a detainee's case to anyone except those with the requisite security clearance and need to know using a secure means of communication. Counsel for detainees in the coordinated cases pending in the United States District Court for the District of Columbia are presumed to have a "need to know" information in related cases pending before this Court. Counsel for respondents in those cases may challenge this presumption on a case-by-case basis for good cause shown.

X. JTF-Guantanamo Security Procedures

- A. Counsel and translators/interpreters shall comply with the following security procedures and force protection safeguards applicable to the US Naval Base in Guantanamo Bay, Cuba, JTF-Guantanamo and the personnel assigned to or visiting these locations, as well as any supplemental procedures implemented by JTF-Guantanamo personnel.
- B. Contraband is not permitted in JTF-Guantanamo and all visitors are subject to search upon arrival and departure. Examples of contraband include, but are not limited to, weapons, chemicals, drugs, and materials that may be used in an escape attempt. Contraband also includes money, stamps, cigarettes, writing instruments, etc. No items of any kind may be provided to the detainee without the advance approval of the Commander, JTF-Guantanamo.
- C. Photography or recording of any type is prohibited without the prior approval of the Commander, JTF-Guantanamo. No electronic communication devices are permitted. All recording devices, cameras, pagers, cellular phones, PDAs, laptops, portable electronic devices and related equipment are prohibited in or near JTF-Guantanamo. Should any of these devices be inadvertently taken into a

EXHIBIT A

prohibited area, the device must be surrendered to JTF-Guantanamo staff and purged of all information.

- D. Upon arrival at JTF-Guantanamo, security personnel will perform a contraband inspection of counsel and translators/interpreters using metal detectors as well as a physical inspection of counsel's bags and briefcases and, if determined necessary, a physical inspection of his/her person.
- E. Counsel shall not be permitted to interview or question members of the Joint Task Force about their duties or interactions with detainees without first obtaining permission from the Commander, Joint Task Force Guantanamo. Should permission be unreasonably denied, counsel may seek an Order from this Court granting permission for good cause shown.
- F. Counsel will meet with a detainee in conference facilities provided by GTMO. These facilities are subject to visual monitoring by closed circuit TV for safety and security reasons. (The only other method of visual observation available is for the door to remain open with military police sitting outside the door.). No oral communications between counsel and detainee will be heard.
- G. At the conclusion of a meeting with a detainee, counsel and translators/interpreters will again be inspected using a metal detector and, if deemed necessary, by physical inspection of their persons.

Exhibit B

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

)	
, et al.)	
)	
Petitioners,)	
)	
v.	)	Civil Action No.
)	
GEORGE W. BUSH,)	
President of the United)	
States, et al.,)	
)	
Respondents.)	

**MEMORANDUM OF UNDERSTANDING REGARDING ACCESS TO
CLASSIFIED NATIONAL SECURITY INFORMATION**

Having familiarized myself with the applicable statutes, regulations, and orders related to, but not limited to, unauthorized disclosure of classified information, espionage and related offenses; The Intelligence Identities Protection Act, 50 U.S.C. § 421; 18 U.S.C. § 641; 50 U.S.C. § 783; 28 C.F.R. § 17 et seq.; and Executive Order 12958; I understand that I may be the recipient of information and documents that belong to the United States and concern the present and future security of the United States, and that such documents and information together with the methods and sources of collecting it are classified by the United States government. In consideration for the disclosure of classified information and documents:

(1) I agree that I shall never divulge, publish, or reveal either by word, conduct or any other means, such classified

EXHIBIT B

documents and information unless specifically authorized in writing to do so by an authorized representative of the United States government, or as expressly authorized by the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____.

(2) I agree that this Memorandum of Understanding and any other non-disclosure agreement signed by me will remain forever binding on me.

(3) I have received, read, and understand the Protective Order entered by the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, and I agree to comply with the provisions thereof.

Date

Date

Exhibit C

EXHIBIT C

ACKNOWLEDGMENT

The undersigned hereby acknowledges that he/she has read the Protective Order entered in the United States District Court for the District of Columbia in the case captioned _____ v. George W. Bush, No. _____, understands its terms, and agrees to be bound by each of those terms. Specifically, and without limitation, the undersigned agrees not to use or disclose any protected information or documents made available to him/her other than as provided by the Protective Order. The undersigned acknowledges that his/her duties under the Protective Order shall survive the termination of this case and are permanently binding, and that failure to comply with the terms of the Protective Order may result in the imposition of sanctions by the Court.

DATED: _____ BY: _____
(type or print name)

SIGNED: _____

It has recently come to the Court's attention that some confusion and certain difficulties have arisen with respect to the filing of documents containing classified or protected information. Most of the difficulties have arisen as a result of the nature of the Court's CM/ECF electronic filing system. To clarify and, hopefully, to improve the filing system, it is hereby

ORDERED that the "Procedures For Filing Documents" contained on pages 13 through 14 of the November 8, 2004 Amended Protective Order are modified and supplemented as follows:

All documents filed by a petitioner shall be filed under seal with the Court through the Court Security Officer for determination by the appropriate agency as to whether the documents contain classified or protected information. At the time of making a submission to the CSO, the attorney shall file on the public record in the CM/ECF system a "Notice of Filing" notifying the Court that a submission has been made to the CSO and specifying in general terms the nature of the filing without disclosing any potentially classified or protected information. It is the Court's understanding that the CM/ECF system requires counsel to attach a document to any entry made by them on the system. Accordingly, the document to be attached to the Notice of Filing in the CM/ECF system shall be a one page submission repeating in general terms the nature of the filing without disclosing any potentially classified or protected information and disclosing the date and time the document was delivered to the CSO for her review.

In the event that the CSO informs counsel for a petitioner that a proposed filing does not contain any classified or protected information, counsel shall then promptly file the full submission in the CM/ECF system and counsel shall make specific reference to the earlier docket

entry notifying the Court that the document had been submitted to the CSO for review. The docket entry description shall also state that the CSO has approved of the public filing of the document. The underlying document filed in the CM/ECF system shall contain a notation in the upper right hand corner of the first page stating “PREVIOUSLY FILED WITH CSO AND CLEARED FOR PUBLIC FILING.”

In the event that the CSO informs counsel for a petitioner that a proposed filing does in fact contain some or all classified or protected information, counsel shall then promptly file in the CM/ECF system a version of the document suitable for public viewing. Unless an entire document is deemed classified or protected, a “version of the document suitable for public viewing” shall mean a document in which the portions of the document containing classified or protected information are redacted. Such document shall contain a notification in the upper right hand corner of the first page stating “REDACTED VERSION FOR PUBLIC FILING CLEARED BY CSO.” In the event an entire document is deemed classified or protected, a “version of the document suitable for public viewing” shall mean a one page “half sheet” containing the caption of the case, a version of the title of the document that does not disclose classified or protected information, and a brief statement that the CSO has informed counsel that the entire document is classified or protected. The docket entry description in the CM/ECF system for the document suitable for public viewing shall make specific reference to the earlier docket entry notifying the Court that the document had been submitted to the CSO for review.

Any pleading or other document filed by counsel for the respondents containing classified or protected information shall be filed under seal with the Court through the CSO. In addition,

counsel for respondents shall file in the CM/ECF system a version of the document suitable for public viewing as that phrase is defined in the preceding paragraph. .

IT IS SO ORDERED.

December 13, 2004

_____/s/_____
JOYCE HENS GREEN
United States District Judge

•

In re Guantanamo Detainee Cases

opportunity to review the material that the respondents seek to have declared “protected.”

In the interest of the efficient administration of these proceedings, it is hereby

the Court deem any information “protected” pursuant to the Court’s November 8, 2004 Amended

Protective Order for the viewing of protected information.

It is FURTHER ORDERED that counsel for petitioners shall treat such disclosed information as “protected” unless and until the Court rules that the information should not be designated as “protected.”

It is FURTHER ORDERED that counsel for petitioners shall make their best efforts to designate one attorney as a representative to review the information on their behalf and to negotiate with counsel for respondents prior to the filing of any motions to deem information “protected.”

With respect to the November 8, 2004 Motion to Designate as “Protected Information” Unclassified Information in Factual Returns to Petitions for Writ of Habeas Corpus That is Not Filed on the Public Record, it is hereby

ORDERED that counsel for respondents shall deliver the information they seek to be deemed “protected” to the Court Security Officer at the designated secured facility on or before November 17, 2004.

It is FURTHER ORDERED that the Court Security Officer shall notify counsel for the petitioners of the location of the secured facility on or before November 12, 2004.

It is FURTHER ORDERED that petitioners’ counsel shall review at the secured facility the information at issue and shall notify the Court of their position with respect to the designation of the information on or before November 19, 2004.

IT IS SO ORDERED.
November 10, 2004

_____/s/_____
JOYCE HENS GREEN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SHAFIIQ (Last Name Unknown), <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1506 (RMC)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

(PROPOSED) ORDER TO SHOW CAUSE

Having considered Respondents' Motion for Order to Show Cause Why Case Should Not Be Dismissed For Lack of Proper "Next Friend" Standing, and it appearing that good cause exists for granting the motion, it is hereby

ORDERED that petitioners shall show cause within ____ days of the date of this order why this case should not be dismissed for lack of proper next friend standing. It is further

ORDERED that respondents shall respond to petitioners' submission in response to this order within ____ days of the filing of petitioners' submission.

IT IS SO ORDERED.

DATED: _____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHAFIIQ (Last Name Unknown), *et al.*,)

Petitioners,)

v.)

Civil Action No. 05-CV-1506 (RMC)

GEORGE W. BUSH,)

President of the United States,)

et al.,)

Respondents.)

**PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION FOR ORDER
TO SHOW CAUSE OR, IN THE ALTERNATIVE,
TO STAY PROCEEDINGS AND REQUEST FOR STATUS HEARING**

Mr. Shafiiq, who is the detainee, and Mr. Jamaal Kiyemba, who is the Next Friend of Mr. Shafiiq ("Petitioners"), through their attorneys, Holland & Hart, LLP, respectfully oppose the Respondents' Motion for Order to Show Cause Why Case Should Not be Dismissed for Lack of Proper "Next Friend" Standing or, In the Alternative, to Stay the Proceedings Pending Related Appeals and For Continued Coordination. Petitioners request that these motions be denied and that instead the Court schedule a status hearing at its earliest convenience.

Respondents now freely acknowledge that Mr. Shafiiq and other detainees are entitled to be represented by counsel for the purpose of seeking a writ of habeas corpus. They suggest that there are processes by which detainees are notified of their right to file a habeas petition (including through a "friend") and to request counsel. They tout a new process negotiated with the American Bar Association ("ABA"), thereby

acknowledging that there should be a meaningful process for advising detainees of their habeas rights and for allowing them to request representation by counsel. If Respondents' intention is to provide such a meaningful process, then their attack on standing is inconsistent. It suggests that Respondents' true intention is impediment and delay.

The Court should reject impediment and delay and deny the Respondents' motion so that counsel have a reasonable opportunity to confer with Mr. Shafiiq directly and to obtain his written instructions. Petitioners request that a status hearing be scheduled at the Court's earliest convenience to ensure that this occurs.

Respondents' alternative motion for stay must also be denied because not all of the legal issues raised in the Petition are pending before the D.C. Circuit Court of Appeals. In particular, many of the claims asserted by the Petitioners challenge the legality of and the government's adherence to the Military Order of November 13, 2001, issued by Respondent Bush. None of the appellate proceedings upon which Respondents base their Motion to Stay involve such claims. Because such claims are not before the D.C. Circuit, there is no reason to delay Petitioner's ability to pursue such claims, and the interest of judicial efficiency – the core rationale for Respondents' Motion to Stay – would not be served by staying this matter. Even if the Court were to stay Mr. Shafiiq's Petition, however, that stay should not delay or impede Mr. Shafiiq's right to consult with counsel.

ARGUMENT

I. RESPONDENTS' MOTION FOR ORDER TO SHOW CAUSE SHOULD BE DENIED AND INSTEAD THE COURT SHOULD SCHEDULE A STATUS CONFERENCE TO ENSURE THAT MR. SHAFIIQ MAY PROMPTLY CONSULT WITH COUNSEL.

Mr. Shafiiq's Petition for Writ of Habeas Corpus was filed in his own name and also on his behalf by Jamaal Kiyemba as his Next Friend. Respondents now argue that the Petitioners must establish proper "next friend" standing or the case should be dismissed. It is neither necessary nor appropriate, however, for the Court to issue an order to show cause and Respondents' motion should be denied.¹

The very need for Mr. Kiyemba to act as Mr. Shafiiq's "Next Friend" is due to Respondents' *own* policies. According to the Department of Defense, the only counsel currently provided access to the detainees are counsel who are employed or retained by or on behalf of a detainee for purposes of representing the detainee in habeas corpus or other litigation in federal court in the United States...." (Letter to Mr. Shayana Kadidal, dated November 2, 2004, Exhibit E to Declaration of Barbara Olshansky dated September 9, 2005, attached hereto as Exhibit 1.) Therefore, under Respondents' own procedures counsel must first file a habeas corpus petition on behalf of a detainee in order to meet with the detainee, and the only petition that counsel can file before such a meeting is a Next Friend petition. Ironically, Respondents now attack the very process they propounded. The written notifications Respondents cite in support of their Motion specifically state that "you may ask a *friend*...to file such a petition with the Court."

¹ Petitioners reserve their legal and factual arguments in support of standing for briefing in the unlikely event the Court issues an order to show cause.

See Declaration of Frank Sweigart, attached to Respondents' Motion as Exhibit B, at ¶¶ 3-5 and attached exhibits. Emphasis added. The notifications do not say that the detainee must seek the assistance of "an individual satisfying the standing requirements under federal law for Next Friend status."

Notwithstanding the contradictory relief sought in Respondents' motion, one thing is now clear: they freely acknowledge that Mr. Shafiiq and other detainees are entitled to be represented by counsel for purposes of seeking a writ of habeas corpus. Mr. Sweigart declares that unnamed detainees in various categories have been informed that they could file a writ of habeas corpus in federal court if they want to challenge the lawfulness of their detention. *See* Declaration of Frank Sweigart, ¶¶ 3-5 and Exhibits A, B and C.² The notifications state, *inter alia*:

You may ask a friend or family member or a lawyer to file such a petition with the Court. If you do not have a lawyer or a family member or a friend who could file this petition for you, you may file your own petition.

Mr. Sweigart also briefly describes a new process the Department of Defense has negotiated with the American Bar Association ("ABA") by which "the ABA has agreed to recruit volunteer counsel for *pro se* petitioners and other detainees who may desire representation." Declaration of Frank Sweigart, ¶7 and Exhibit E thereto. The involvement of the ABA is a positive step and only confirms that the Respondents now

² Petitioners do not concede the adequacy of the notifications described in Mr. Sweigart's Declaration and reserve all arguments in that regard. Moreover, Mr. Sweigart does not provide *any* information specifically about Mr. Shafiiq. He does not confirm what category of detainee Mr. Shafiiq falls within or that a notification was in fact served upon him. He does not reveal whether the notification was provided in a language Mr. Shafiiq can understand, whether Mr. Shafiiq in fact understood his rights as set forth in the notification or whether he was in a position to act on those rights.

acknowledge that there must be a meaningful process for advising detainees of their habeas rights and for allowing them to request representation by counsel. Whether this new ABA process will be meaningful remains to be seen, however. For example, Respondents' Motion and the Declaration of Frank Sweigart are both worded ambiguously so that it is not clear whether the notification will be provided to *all* detainees or only to those who have previously filed *pro se* petitions or have previously requested counsel. If the ABA notification is not given to all detainees, it would be deficient on its face.

But even assuming the new ABA process will be meaningful, that does not provide a basis for issuing an order to show cause. Respondents argue that given the past notifications and the new ABA process, if Mr. Shafiiq wanted to file a petition for writ of habeas corpus, he would (or will) do so on his own behalf. They suggest that these "next friend" petitions must therefore be subjected to rigorous scrutiny under an order to show cause to determine whether the requirements of Whitmore v. Arkansas, 495 U.S. 149 (1990) have been met. The futility and waste of this exercise is obvious. Even if the Court were to issue an order to show cause, even if "next friend" standing were thoroughly briefed and even if Mr. Shafiiq's petition were dismissed for lack of standing, presumably Mr. Shafiiq nevertheless would be given the ABA notice. In all likelihood, he would send the card to the ABA requesting counsel, the ABA would appoint counsel (likely the counsel who filed the original petition) and the same petition for writ of habeas corpus would then be re-filed after months or years of delay. If the Respondents' position is that this is the process that must be followed – a process with

no meaningful legal significance – they will have confirmed allegations that their principal objective is impediment and delay.

There is an obvious solution: deny the motion for order to show cause and allow the consultative process to proceed. The opportunity to consult directly with counsel would assure that Mr. Shafiiq understands the notification purportedly given to him and the new ABA processes and would allow counsel to obtain Mr. Shafiiq's written instructions. In this way, the Court can be assured that Mr. Shafiiq has made an informed decision, rather than having to infer that Mr. Shafiiq does not want counsel and wishes to stay in detention indefinitely, as the Respondents would have.

Respondents themselves confirm the reasonableness of allowing the consultative process to proceed:

Even if the Court finds that petitioners have established next friend standing so that the Court can exercise jurisdiction over the petitions, the next friends should not be permitted to serve in this capacity beyond the time when counsel are permitted to meet with the detainees for whom habeas relief is sought. (*citations omitted*)...(permitting counsel two visits with a detainee before an authorization of representation by the detainee must be provided to respondents.) *At that time, counsel should determine these detainees' wishes concerning pursuing a challenge to their detention through the habeas petitions in these cases, such that the cases can then either be converted into direct petitions or be dismissed.*

Motion, footnote 12. Emphasis added.

Petitioners respectfully request that the motion for order to show cause be denied to allow the consultative process to proceed. The Court should understand, however, that there are other serious impediments to Mr. Shafiiq's consultation with counsel.

The Department of Defense is taking months to process security clearances, for example. (*See also* the impediments described in the Declaration of Barbara Olshansky.) To ensure that Mr. Shafiiq is given effective notice of his rights and a prompt and real opportunity to consult with counsel, the Petitioners respectfully request that the Court schedule a status conference at its earliest convenience.

II. RESPONDENTS' ALTERNATIVE MOTION FOR STAY SHOULD BE DENIED BECAUSE THE CLAIMS ASSERTED BY MR. SHAFIIQ HAVE NOT BEEN ADDRESSED BY ANY DISTRICT COURT AND ARE NOT BEFORE ANY APPELLATE COURT

Respondents contend that if this matter is not dismissed for lack of standing, this case should be stayed because all of the issues raised in the Petition are currently pending on appeal before the D.C. Circuit Court of Appeals. Respondent's Motion at 15. This contention, however, is inaccurate. Petitioners assert a number of claims based on and challenging the Military Order of November 13, 2001, "Detention of Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (November 13, 2001) ("Military Order"). Among other things, the Military Order requires that "[a]ny individual subject to this order shall be ... (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria" Military Order, § 3(b). None of the appellate proceedings upon which Respondents base their Motion to Stay involve claims which challenge the legality of the Military Order or the government's failure to abide by the terms of the Military Order. Accordingly, there is no reason to stay Petitioners' rights to pursue these claims.

Among the allegations related to the Military Order which are asserted in the Petition are the following:

- The Military Order exceeds the Executive's authority under Article II of the United States Constitution, and is *ultra vires* and void on its face (Petition at ¶ 40);
- The Military Order was neither authorized nor directed by Congress, and is, therefore, beyond the scope of Joint Resolution 23, authorizing the use of military force, which was passed by Congress on September 18, 2001 (Petition at ¶ 41);
- The Military Order unlawfully authorizes indefinite and unreviewable detention (*Id.* at ¶ 48);
- The Military Order violates the Fifth Amendment of the United States Constitution (*Id.* at ¶ 103);
- Even if the Military Order were legitimate and lawful, the conditions of Petitioner Shafiiq's detention at Guantanamo violate the requirements of the Military Order (*Id.* at ¶¶ 60 – 83), and;
- The government's practice of engaging in extraordinary rendition of Guantanamo detainees violates the provisions of the Military Order (*Id.* at ¶¶ 84 – 88).

Additionally, the Prayer for Relief in the Petition seeks specific relief with respect to the Military Order, including an order declaring that the Military Order is unlawful, or

in the alternative, for an order requiring the government to comply with the provisions of the Military Order.

Respondents' Motion to Stay is predicated on pending appeals of three separate rulings issued by different judges in this District. In particular, the Motion relies on orders issued by Judge Leon dismissing claims in Khalid v. Bush, No. 04-CV-1142 (RJL), and Boumediene v. Bush, No. 04-CV-1166 (RJL), 355 F. Supp.2d 311 (D.D.C. 2005); and an order issued by Judge Green denying in part and granting in part the government's motion to dismiss claims in In re Guantanamo Detainee Cases, No. 02-CV-0299, et. al, 355 F. Supp.2d (D.D.C. 2005). Each of these orders is currently pending before the D.C. Circuit. None of these pending appeals involves claims challenging the legality of the Military Order, or the government's adherence to its provisions. Judge Leon specifically noted in the Boumediene and Khalid matters, for example, that the Petitioners did not challenge the legality of the Military Order. 355 F. Supp.2d at 324. Because such claims were not raised in In re Guantanamo Detainee Cases, Boumediene, or Khalid, the viability of such claims is not currently pending before the D.C. Circuit.

The fundamental premise of Respondents' Motion to Stay is that the issues raised in the Petition are all included within the scope of the matters on appeal before the D.C. Circuit, and that it would be a waste of judicial resources to allow this matter to move forward until those issues are resolved on appeal. However, that argument is inapposite in this case, where there are issues that are not before the D.C. Circuit. There is no reason why Petitioners should be required to wait to pursue these claims until appeals in

other cases addressing different issues are concluded. Given the concerns raised by the Petition, including whether there is a sufficient legal basis for Mr. Shafiq's indefinite detention and whether the government has complied with mandate of the Military Order to treat Mr. Shafiq humanely, the government should be required to present a compelling justification for delaying Petitioners' ability to proceed with this matter. The only justification offered by Respondents for entering the requested stay does not apply to Petitioners' Military Order claims, and for that reason, the Motion to Stay should be denied.

Alternatively, even if the Court were inclined to grant the Motion to Stay, Petitioners request that the Court order the Government to submit a factual return in response to the Petition. The Respondents have acknowledged in their motion that, even if the requested stay is granted, counsel for Petitioners should nevertheless be entitled to communicate with Petitioners, pursuant to the procedures that have been established to protect against the unauthorized dissemination of classified information. Counsel's ability to engage in such communications in a meaningful manner would be significantly impaired if the government were not required at least to provide counsel with a factual return outlining the alleged basis for Petitioner Shafiq's detention. It should be noted that Respondents have been specifically ordered to provide factual returns in six other cases, despite the fact that the cases had otherwise been stayed.³

³ See, e.g., *Kurnaz v. Bush*, 04-CV-01135 (ESH), 2005 WL 8329542, at *1 (D.D.C. Apr. 12, 2005) (stating that habeas counsel require access to the full factual returns now "to ensure that the proceedings can continue in an orderly fashion in the event that detainees prevail on appeal"); *Al-Adahi v. Bush*, 05-CV-00280 (GK), slip op. at 2 & n.1 (D.D.C. Apr. 29, 2005) (ordering production of factual

WHEREFORE, Petitioners respectfully request that the Court deny Respondents' Motion for Order to Show Cause, as well as its alternative Motion to Stay, and to schedule a status conference to discuss the process by which Counsel for Petitioners will be provided a meaningful and timely opportunity to confer with their clients. Petitioners further request that in the event that the Court grants the Motion to Stay, that the Court order that Respondents provide Petitioners with a factual return in response to the Petition within a reasonable time.

returns so that petitioners' counsel "can begin preparing their defense well in advance of any ruling by the Court of Appeals"); *Al-Anazi v. Bush*, 05-CV-00345 (JBD), slip op. at 20 (D.D.C. Apr. 21, 2005) (ordering the U.S. Government to produce factual returns and noting that "the factual returns appear necessary for petitioners' counsel effectively to represent petitioners," and "even initial conversations by counsel with their clients may be very difficult without access to that basic factual information"); *see also Al-Shamri v. Bush*, 05-CV-00551 (RWR), slip op. at 4 (D.D.C. May 10, 2005) (staying proceedings but ordering the Government to produce factual returns); *El-Banna v. Bush*, 04-CV-01144 (RWR), slip op. at 7 (D.D.C. Apr. 8, 2005) (same); *Errachidi v. Bush*, No. 05-CV-00640 (EGS) (D.D.C. Apr. 21, 2005) (minute order) (same).

Respectfully submitted,

Counsel for Petitioners:

/s J. Triplett Mackintosh

J. Triplett Mackintosh (Colorado State Bar #22359)
Hamid M. Khan (Colorado State Bar #34139)
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, Co 80202
(303) 295-8000

Mona Burton (Utah State Bar #5399)
Robert G. Wing (Utah State Bar #4445)
James R. Farmer (Utah State Bar #8592)
Amy Poulson (Utah State Bar #9378)
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111
Telephone: (801) 595-7800

Of Counsel

Barbara J. Olshansky (New York State Bar #3635)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
Telephone: (212) 614-6439

CERTIFICATE OF SERVICE

I certify that on September 12, 2005, I served a copy of the foregoing document to the following by electronic filing and also by U.S. Mail.

c/o Preeya Noronha
Peter D. Keisler
Joseph H. Hunt
Kenneth L. Wainstein
Douglas N. Letter
Vincent M. Garvey
Terry M. Henry
James J. Schwartz
Robert J. Katerberg
Nicholas J. Patterson
Andrew I. Warden
Edward H. White
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
preeya.noronha@usdoj.gov

/s Danielle R. Voorhees
Danielle R. Voorhees
Holland & Hart LLP
555 17TH STREET, SUITE 3200
DENVER, CO 80202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
SHAFIIQ (Last Name Unknown), <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1506 (RMC)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
_____)	

DECLARATION BY ATTORNEY BARBARA OLSHANSKY

I, Barbara Olshansky, declare that the following statements are true to the best of my knowledge, information, and belief:

1. I am a member in good standing of the bar of this Court and have practiced law for 18 years. I am also an attorney in good standing in the State of New York.
2. For the last three years, I have been actively involved in the steps that my office, the Center for Constitutional Rights (CCR), has taken to (1) advance the rights of the Guantánamo detainees through litigation establishing their right to file petitions for writs of *habeas corpus* in federal court; (2) work with other non-profit organizations to reach out to the family members of the Guantánamo detainees for the purpose of filing next-friend petitions for writs of *habeas corpus*; and (3) recruit and train private attorneys to represent individual Guantánamo detainees on a *pro bono* basis.

EXHIBIT 1

3. CCR has engaged in extensive litigation, advocacy and public education on behalf of the individuals detained at Guantánamo Bay, including the following:

A. *Request to Inter-American Commission on Human Rights for Precautionary Measures on Behalf of the Guantánamo Detainees.* In February of 2002, CCR requested that the Inter-American Commission on Human Rights (IACHR) of the Organization of American States issue precautionary measures to protect the detainees at Guantánamo Bay. On March 12, 2002, the IACHR requested that the U.S. Government take the urgent measures necessary to have the legal status of the detainees determined by a competent tribunal. The U.S. Government has failed to comply and continues to fail to comply with the IACHR's request. See Decision on Request for Precautionary Measures (Detainees at Guantánamo Bay, Cuba), Inter-Am. C.H.R. (Mar. 12, 2002), *reprinted in* 41 I.L.M. 532, 533 (2002).

B. *Habib v. Bush & Rasul v. Bush.* In February and May of 2002 CCR filed *habeas corpus* petitions challenging the U.S. government's practice of holding foreign nationals in indefinite detention at Guantánamo without access to the courts or the right to know the charges against them. CCR filed the petitions on behalf of two Australian citizens, David Hicks and Mamdouh Habib, and two men from the United Kingdom, Shafiq Rasul and Asif Iqbal. The petitions challenged respondents' indefinite detention of petitioners without due process of law, in violation of the U.S. Constitution and other federal laws, the Geneva Conventions, and international humanitarian and human rights law. CCR and its co-counsel litigated the case before the District Court, the D.C. Circuit Court of Appeals, and the United States Supreme Court. On June 28, 2004, the Supreme Court held that the detainees have the right of access to U.S. courts to challenge their detention under 28 U.S.C. § 2241. *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004).

4. Responding to the Supreme Court's historic decision upholding the rule of law at Guantánamo, CCR has spearheaded the effort to get each detainee his day in court. Since the Supreme Court decision, CCR and its partners have arranged for private law firms to represent detainees and file *habeas corpus* petitions on a pro bono basis in this Court. Through these efforts, more than 200 detainees currently have *habeas corpus* petitions pending in this Court.

5. Because the U.S. government has refused to provide CCR or any other organization or attorney access to the Guantánamo detainees in any manner that would facilitate providing them advice regarding their right to file a habeas petition and the availability of pro bono counsel to represent them, each of the petitions currently on file with this Court was made possible through one of two means: (i) requests by the family members or loved ones of those detained for legal assistance from CCR or from other human rights organizations or counsel with whom CCR is working; or (ii) requests made through certain detainees (who are represented by counsel) acting as next friends for other detainees who have expressed their desire to retain counsel and file habeas petitions.

6. More specifically, CCR and its partner organizations received authorizations from next friends through outreach activities which included, among other things, taking part in human rights conferences around the world, contacting international human rights organizations, and searching for family members of known detainees. In addition, advocates working with CCR made numerous outreach efforts to member countries of the European Parliament seeking their assistance in locating their citizens. Despite these efforts, CCR and its partners have not been able to identify next friends for the vast majority of Guantánamo detainees.

7. CCR and its partners have used the information they have obtained to date to match detainees with private law firms willing to represent detainees on a *pro bono* basis and file *habeas corpus* petitions on the detainees' behalf.

8. However, despite the work of CCR and its *pro bono* partners, the vast majority of detainees at Guantánamo – upon information and belief, approximately 300 –

remain unrepresented for the simple reason that the United States Government has held them virtually incommunicado and in physical isolation.

9. The Government's refusal to disclose the names of the Petitioners, to provide the Petitioners with meaningful notice of their rights, and to permit CCR or any similar organization to communicate with them regarding these rights has prevented the Petitioners from being able to access and obtain counsel to do what the Supreme Court said they have a right to do—file *habeas* petitions challenging the legality of their detention.

10. In addition to its own efforts as described above, CCR has also tried to work with the United States Government to ensure that every detainee at Guantánamo is able to take advantage of his right to file a *habeas corpus* petition, as affirmed by the U.S. Supreme Court in *Rasul v. Bush*.

11. Despite a number of good faith efforts to negotiate with Respondents, CCR has been denied any opportunity to communicate with the detainees at Guantánamo to advise them of their rights, and assist them in retaining counsel.

12. In a July 1, 2004 letter to Respondent Rumsfeld, CCR Legal Director Jeffrey Fogel requested immediate access to the unrepresented detainees. Mr. Fogel offered to organize a delegation of lawyers to travel to Guantánamo to inform them of their rights under *Rasul*, and to assist them in obtaining legal representation. A true and correct copy of that letter is attached to this Declaration as Exhibit A. Mr. Fogel did not receive any reply to his request.

13. Mr. Fogel subsequently contacted Gordon England, Secretary of the Navy, by letter dated July 14, 2004. In this letter, Mr. Fogel stated that the detainees had still

not been adequately informed of their rights under *Rasul*, and again offered to lead a delegation of lawyers to Guantánamo to provide detainees with information about their rights under *Rasul* and to aid them in seeking legal representation. A true and correct copy of the July 14, 2004 letter is attached to this Declaration as Exhibit B.

14. Alberto J. Mora, General Counsel of the Navy, responded to CCR's July 14 letter by letter dated July 20, 2004. Mr. Mora stated that the "Department of Defense and the Department of the Navy are in the process of exploring, in concert with the Department of Justice, the manner in which additional information will be provided to the detainees regarding habeas corpus applications." Mr. Mora did not provide any concrete information regarding how these Departments would provide the detainees with information about their rights, nor did he indicate any willingness to negotiate access to the unrepresented detainees by CCR or any other counsel. A true and correct copy of July 20, 2004 letter is attached to this Declaration as Exhibit C.

15. In another attempt to assist the Guantánamo detainees, CCR attorney Shayana Kadidal, sought to apply for security clearance in order to meet with unrepresented detainees. The Solicitor General's Office informed Mr. Kadidal that it only handled security clearances for existing petitions and he would have to seek access to the unrepresented detainees through the Department of Defense General Counsel's Office, which stated it would handle the clearance "like any other request for a visit to Guantánamo."

16. On September 16, 2004, Mr. Kadidal applied for clearance through the Department of Defense. A true and correct copy of Mr. Kadidal's application is attached to this Declaration as Exhibit D. Mr. Kadidal's application was denied by letter dated

November 2, 2004. Mr. Kadidal did not receive the November 2, 2004 letter until

December 8, 2004. The November 2, 2004 letter stated that:

Under procedures set up by the Department of Defense, the only counsel currently provided access to the detainees are counsel who are employed or retained by or on behalf of a detainee for purposes of representing the detainee in habeas corpus or other litigation in federal court in the United States ...

A true and correct copy of the November 2, 2004 letter is attached to this Declaration as Exhibit E.

17. On December 17, 2004, CCR sent yet another letter to Secretary England requesting the names and identifying information of all unrepresented detainees at Guantánamo, so that CCR could contact the remaining detainees or their family members, to advise them of their rights under *Rasul* and of the availability of volunteer lawyers to assist them in bringing *habeas* actions. A true and correct copy of that letter is attached to this Declaration as Exhibit F.

18. This request was also denied. In a letter dated January 14, 2005, Principal Deputy Associate Attorney General Brian Boyle stated that the Department of Defense: “believe[s] that each of [CCR’s] concerns is being effectively addressed by the habeas filing opportunities currently afforded detainees, or is of marginal bearing on the issue of detainee access to the habeas process.” A true and correct copy of that letter is attached to this Declaration as Exhibit G.

19. The Government has also failed to adequately inform the unrepresented detainees of their rights. Between July 12 and 14, 2004, each detainee apparently was given a notice (the “July Notification”) stating:

. . . United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. **You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts.** (emphasis added)

20. Notwithstanding this promise by the Government, for more than five months, the Government did nothing to adequately explain the “procedures . . . available should [the detainees] seek to challenge [their] detention in U.S. courts.”

21. In mid-December 2004, the Department of Defense posted on its website a second notification (the “December Notification”) which addresses the possibility of the detainees’ seeking *habeas* relief. But the December Notification, like the July Notification, did not provide detainees with practical information that would in any way enable them to secure counsel to file a petition in court. In fact, the December Notification merely informs detainees that they can file their *own habeas corpus* petitions.

22. We believe that the Government’s July and December Notifications are inadequate to enable the unrepresented detainees to make and implement meaningful decisions as to the filing of *habeas corpus* petitions. It is especially significant in this regard that CCR and other *habeas* counsel have received information that corroborates the repeated reports by the press and official investigative bodies: many of the detainees may be in poor physical and mental condition. *See, e.g.*, United Nations Press Release, “United Nations Human Rights Experts Express Continued Concern About Situation of Guantánamo Bay Detainees,” Feb. 4, 2005. The unrepresented detainees, moreover, are now beginning the fourth year of a detention that makes it nearly impossible for them to contact the outside world.

23. The additional information dissemination plans outlined in Mr. Boyle's January 14, 2005 letter did not cure these deficiencies. Mr. Boyle states that the Department of Defense plans to provide a "supplemental information sheet with the names and addresses of U.S. lawyers" to "detainees who inquire about the availability of a lawyer for purposes of filing a habeas petition." *See* Exhibit G. But the detainees cannot be expected to trust the military officers who serve as their custodians and interrogators to provide them with attorneys who will act as zealous advocates on their behalf. As a consequence, it seems highly unlikely that the detainees will ask their captors for help, or trust their statements. Moreover, the "supplemental information," should it materialize, does not aid those detainees who are physically or mentally unable to express an interest in advocating on their own behalf.

I declare, under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 9th day of September, 2005, New York, New York.

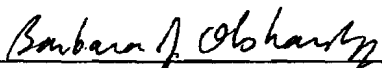

Barbara Olshansky (NY0057)

EXHIBIT A

66 broadway new york, ny 10012
212 614 6454 / 212 614 6499 www.ccr-ny.org

July 1, 2004

Hon. Donald H. Rumsfeld
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Rumsfeld:

As you know, the Center for Constitutional Rights represents two of the petitioners in the decision of the United States Supreme Court entitled *Rasul v. Bush*. In addition, we represent 51 other detainees being held by the United States at Guantánamo Bay.

I write to insist that we be permitted unfettered access to our clients as expeditiously as possible. There is no question of the right of each of them to file petitions for habeas corpus and to have access to counsel in order to do so.

In addition, it is incumbent on the United States government to provide a means of informing each of the persons held by it at Guantánamo of the fact of the decision and of their rights pursuant to the ruling of the Court. They must also have means to contact their families or others for the purpose of securing counsel. We are prepared to organize a delegation of attorneys for that purpose.

I look forward to your prompt response.

Very truly yours,


Jeffrey E. Fogel
Legal Director



EXHIBIT B

66 broadway new york, ny 10012
12 614 6464 1212 614 6489 www.ccr-ny.org

July 14, 2004

Hon. Gordon R. England
Secretary of the Navy
1000 Navy Pentagon
Washington, D.C. 20350-1000

BY FAX: 703-693-7330
and regular mail

Re: Guantanamo detainees

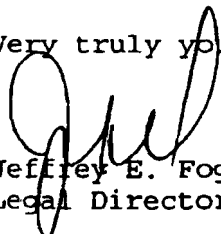
Dear Secretary England:

The Center for Constitutional Rights has reviewed the proposed notice which will be provided to each of the detainees held by the United States at Guantanamo Bay.

As the notice itself says, there is a need for additional information on the issue of habeas corpus applications. No explanation is given to these foreign nationals of what a habeas corpus petition is, or what their rights are in light of the Supreme Court decision in Rasul v. Bush. Moreover, no information is provided about how the detainees may secure counsel (who are available) in order to file and prosecute such an action. There is an obvious conflict of interest where the armed forces provides legal advice to the persons who are its adversaries, and there are ethical problems with having non-lawyers (the "Personal Representatives") provide legal advice.

As a public interest law firm, CCR has offered to organize a delegation of lawyers who would be willing to provide the kind of information necessary for each of the detainees to understand their rights, to make a meaningful choice of their legal options and to assist in securing legal representation. Meanwhile, I enclose herewith a form of notice which would, at least, begin the process necessary to comply with the Constitution of the United States, international law as well as the decision of the Supreme Court.

Very truly yours,


Jeffrey E. Fogel
Legal Director



NOTICE OF RIGHT TO CHALLENGE DETENTION IN FEDERAL COURT

You now have the right to be represented by counsel in federal court on a writ of habeas corpus. This is a legal process where we are able to question whether you are being held illegally and, if you are being held illegally, ask that a court order your release. The *Center for Constitutional Rights* (CCR) is a charity that has been fighting for this right on behalf of the prisoners in Guantanamo Bay. CCR is strongly opposed to the denial of rights that has prevailed in Guantanamo Bay for the past two and a half years, and is willing to secure you a lawyer at no cost to yourself for such a process. If you wish, CCR will also contact your family and advise them that steps are being taken on your behalf.

If you would like to be represented by CCR, please fill in your name, nationality, and date of birth below, along with the languages you speak (so we can try to secure assistance for you in your own language):

Name: _____

Nationality: _____

Date of Birth: _____

Languages spoken: _____

If you wish us to contact your family, please provide a name, address, telephone number, e-mail or some other contact details so that we can do this (if you do not wish to do this, we understand that you may be concerned that the U.S. Government might use this against you):

Name of Relative: _____

Contact details: _____

EXHIBIT C



DEPARTMENT OF THE NAVY
GENERAL COUNSEL OF THE NAVY
1000 NAVY PENTAGON
WASHINGTON, D.C. 20350-1000

JUL 20 2004

Mr. Jeffrey E. Fogel
Legal Director
Center for Constitutional Rights
666 Broadway
New York, NY 10012

Dear Mr. Fogel:

Thank you for your letter of July 14, 2004, regarding the notice to be provided to detainees held at Guantanamo Bay, Cuba. The Secretary of the Navy has asked me to review your letter and respond to you directly.

The Department of Defense and the Department of the Navy are in the process of exploring, in concert with the Department of Justice, the manner in which additional information will be provided to the detainees regarding habeas corpus applications. We will add your input to those we have already received. We are working hard to satisfy the mandate of the recent Supreme Court decisions within the constraints of the unique security situation that exists at Guantanamo.

Thank you for your interest in this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Alberto J. Mora".

Alberto J. Mora

EXHIBIT D

centerforconstitutionalrights

666 Broadway New York, NY 10012
212 614 6464 f 212 614 6499 www.ccr-ny.org

September 16, 2004

John J. Sullivan, Esq.
Deputy General Counsel
Department of Defense
Room 3C975
1600 Defense Pentagon
Washington DC 20301

Dear Mr. Sullivan:

I am writing to seek authorization to visit unrepresented detainees being held at Camp Delta in the Guantánamo Bay Naval Station and advise them on their right to file habeas corpus petitions in federal court challenging the legality of their detention, and assist them in obtaining other counsel in order to do so.

As I stated in our phone conversation earlier today, I am seeking to meet with unrepresented detainees, that is, those who have not retained counsel themselves and who do not have next friends who have already filed habeas petitions on their behalves. There are some individual detainees who I believe fall within this class whose names I can provide to you if it will expedite this process.

I spoke earlier today with David Salmons, Esq. of the Solicitor General's Office, who has authorized the Department of Justice Court Security Office to process the security clearance applications of various habeas counsel for Guantánamo detainees. Mr. Salmons informed me that because no cases had yet been filed in federal court on behalf of the detainees I seek to visit, the Department of Justice could not process my security clearance application. He recommended that I speak to you.

When we spoke earlier today you did not indicate whether you expected me to include a copy of a security clearance application with this letter. I have taken the liberty of including a completed SF86 form, with certain additional waivers requested by the Department of Justice as part of its Guantánamo clearance process. The Department of Justice Court Security Office provides fingerprint cards to attorneys seeking clearance to visit clients in Guantánamo; if your office could arrange for delivery of appropriate fingerprint cards I will have a set of my prints made at our local police precinct immediately.

Please feel free to contact me with any questions you may have about this matter at (212) 614-6438. Thank you for your assistance, which I am sure will be appreciated by the detainees.

Yours sincerely,



Shayana Kadidal, Esq.



EXHIBIT E

DEC-08-2004 15:22

ODGCLC

P.02



**DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600**



NOV 03 2004

**Shayana Kadidal
Center for Constitutional Rights
66 Broadway
New York, New York 10012**

Dear Mr. Kadidal:

I am writing in response to your letter of September 16, 2004, requesting access to detainees at Guantanamo Bay.

Under procedures set up by the Department of Defense, the only counsel currently provided access to the detainees are counsel who are employed or retained by or on behalf of a detainee for purposes of representing the detainee in habeas corpus or other litigation in federal court in the United States and who are admitted, either generally or pro hac vice, in the jurisdiction where the habeas petition or other litigation is pending. As you do not meet those criteria, your request for access to the detainees cannot be granted.

If you have any questions about this policy, please contact Andrew Warden at the Department of Justice at (202) 616-5084

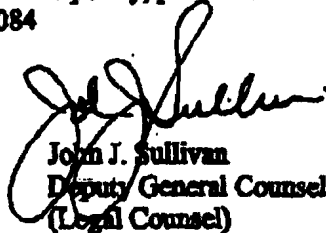

**John J. Sullivan
Deputy General Counsel
(Legal Counsel)**



EXHIBIT F

666 broadway new york, ny 10012
212.614.6464 www.ccr-ny.org

December 17, 2004

Hon. Gordon R. England
Secretary of the Navy
1000 Navy Pentagon
Washington, DC 20350-1000

VIA FACSIMILE: (703) 693-7330

Dear Secretary England,

As you know, the United States presently acknowledges detaining approximately 550 individuals at the Guantánamo Bay Naval Base, Cuba. Approximately 63 of those individuals have filed habeas corpus petitions with the D.C. district court. We intend to take any legal action necessary, including filing habeas petitions on behalf of the remaining detainees, in order to ensure that every detainee at Guantánamo has the opportunity to avail themselves of the decision in *Rasul*.

Accordingly, we are writing to request that you provide us with the names and other identifying information about each person held at Guantánamo whose identity has not yet been made known and who has not yet filed a petition for a writ of habeas corpus ("unidentified detainee" or "detainee"). This request encompasses every detainee being held at Guantánamo by any agency of the U.S. Government or any employee or agent, public or private, thereof, regardless of whether the individual is listed on the International Committee of the Red Cross internee rolls. This information must be provided so that each detainee can be contacted and offered legal assistance.

We specifically request the following information for all such detainees:

(a) names, including all alternate spellings, aliases, or other appellations used by the U.S.



Government; (b) ethnicity and national origin; (c) country or countries of citizenship; (d) country of residence prior to interdiction; (e) next of kin and their contact information; (f) the names and countries for the detainees' consular contacts. The information that will enable us to reach a detainee's next of kin is required so that we will be able to contact those individuals in the event that any detainee is unable to make a decision by himself regarding whether or not to file a petition for a writ of habeas corpus.

The right to counsel has been recognized by the Supreme Court and is crucial to carrying out the Supreme Court's mandate that each detainee be permitted to challenge his detention. *See Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2652 (plurality opinion of O'Connor, J.) ("He [Hamdi] unquestionably has the right to access to counsel in connection with the proceedings on remand."); *id.* at 2660 (concurring opinion of Souter, J.); *Rasul v. Bush*, 524 U.S. ___, 124 S. Ct. 2826, 2698 n.15 (2004) (plaintiffs' allegations of detention "without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"); *see also Al Odah v. United States*, No. 02-828 (D.D.C. Oct. 20, 2004), slip op. at 8 (the "Supreme Court has found that Petitioners have the right to bring their claims before this Court, and this Court finds that Petitioners cannot be expected to exercise this right without the assistance of counsel.").

After the Supreme Court released its opinions in *Rasul* and *Hamdi*, Government officials publicly acknowledged the necessity of taking action to enable detainees to consult with counsel. For example, during a Department of Defense briefing on July 7, 2004, a senior Justice Department Official was asked whether currently unrepresented Guantanamo detainees would have access to counsel. The official replied that lawyers

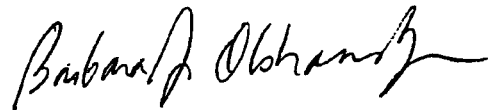
would have access to the detainees but that the “precise details of that would have to be worked out in the future.” Defense Department Background Briefing on the Combatant Status Review Tribunals, July 7, 2004, available at <http://www.defenselink.mil/transcripts/2004/tr20040707-0981.html>. Similarly, in a news briefing two days later, you promised that the Government would “facilitate” access to the unidentified detainees as “quickly as we can.” Defense Department News Briefing on the Combatant Status Review Tribunals, July 9, 2004, available at <http://www.defenselink.mil/transcripts/2004/tr20040709-0986.html>.

Unfortunately, these promises have not been honored. We recognize that the Department of Defense has recently made available the text of a Notification, a copy of which we have attached to this letter as Exhibit A, that it intends to distribute to all detainees after they have completed the Combatant Status Review Tribunal (“CSRT”) process and received certifications. Although the Notification mentions the right to file a habeas petition, it is insufficient for a number of reasons. First, the Notification does not explain the mechanics of filing a habeas lawsuit. There is no explanation of what a “petition” is or should allege. Second, detainees, who are not familiar with U.S. law, certainly will not understand what a habeas lawsuit is (notwithstanding the description that appears in the Notification). Third, the detainees have no reason to trust the person delivering the Notification -- a representative of the U.S. Government -- and as a result might doubt that the Notification means what it says. This is particularly true given that these same individuals will have just been denied relief through the CSRT process. Fourth, the Notification’s instruction that the detainees speak with their “assigned Assisting Military Officer” if they have any questions is particularly problematic and

objectionable, because the officer would lack a privileged relationship with the detainee and would be free to communicate any information that he or she learns from the detainee to his or her superiors. Fifth, the Notification does not provide any instruction on how the detainee could retain a lawyer, should he desire legal advice or assistance with this matter before the petition is filed. Sixth, the Notification makes no provision for assistance for those detainees who are illiterate or otherwise lack the capacity to advocate on their own behalf. Seventh, the Notification provides no assurance that these "petitions" or letters to family members will be mailed in a timely manner. Our understanding is that getting mail in and out of Guantánamo is a very difficult and time-consuming process. Moreover, even if the mail reaches the district court, there does not appear to be any process in existence to expedite the assignment of counsel for detainees seeking counsel to represent them. Finally, it appears that this Notification is being distributed to detainees only *after* their certification as "enemy combatants" through the CSRT process.

Nearly six months have elapsed since the Supreme Court issued its decisions in *Rasul* and *Hamdi*, yet the unidentified detainees at Guantánamo have been unable to pursue the right that the Supreme Court recognized in these cases -- the right to file a habeas petition with the assistance of counsel. There has been ample time for you to take action to effectuate the Supreme Court's holding in *Rasul*, as you and other U.S. officials promised in the first week of July 2004. Accordingly, if we do not receive by January 5, 2005 the detainees' names and the other identifying information that we have requested, we will take appropriate legal action on behalf of the detainees through the judicial process.

Sincerely,

A handwritten signature in black ink, appearing to read "Barbara Olshansky". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Barbara Olshansky,
Deputy Legal Director
Center for Constitutional Rights

cc:
Terry Henry, United States Department of Justice
FAX: (202) 616-8470

EXHIBIT G

**U.S. Department of Justice****Office of the Associate Attorney General**

Washington, D.C. 20530

January 14, 2005

VIA FACSIMILE AND ELECTRONIC MAIL

Ms. Barbara Olshansky
Deputy Legal Director
Center for Constitutional Right
666 Broadway
New York, NY 10012

Dear Ms. Olshansky:

The Secretary of the Navy, Gordon England, has asked me to reply to your letter of December 17, 2004, to him raising concerns regarding the ability of enemy combatants detained at Guantanamo Naval Base to access habeas corpus opportunities in U.S. federal courts.

It has been longstanding Department of Defense ("DOD") policy, reinforced by requests from a number of home countries, not to release detainee names into the public domain. We believe each of your concerns is effectively being addressed by the habeas filing opportunities currently afforded detainees, or is of relatively marginal bearing on the issue of detainee access to the habeas process. Therefore, DOD declines to provide the Center for Constitutional Rights with the detainees' names or other identifying information as requested in your letter.

Nevertheless, it may be of interest to you that DOD is currently preparing a supplemental information sheet that would be provided to those detainees who inquire about the availability of a lawyer for purposes of filing a habeas petition. DOD's intentions are to include in the information sheet the names and addresses of U.S. lawyers who may be available to provide representation to interested detainees, or who may be able to refer the request for representation to other attorneys. (The disclosure of names and addresses will obviously be subject to the prior approval of the lawyers in question.) The information sheet will include instructions for detainees interested in legal representation concerning, for example, what information to include in a letter to counsel. DOD has requested that we discuss the formulation of this information sheet with the lawyers who are currently involved in representing Guantanamo detainees in habeas matters, among others.

- 2 -

If you and other lawyers involved in Guantanamo litigation are interested in pursuing such a discussion, please contact me at your earliest convenience.

Sincerely,



BRIAN D. BOYLE
Principal Deputy Associate Attorney General

cc: (Via Electronic Mail)
Lead Counsel of Record/Guantanamo Litigation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AHMED DOE, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1458 (ESH)

ADIL BIN MUHAMMAD AL
WIRGHI, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1497 (RCL)

NABIL (Last Name Unknown), *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1504 (RMC)

ABBAR SUFIAN AL HAWARY, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1505 (RMC)

SHAFIIQ (Last Name Unknown), *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-1506 (RMC)

JAMAL KIYEMBA, *et al.*,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States,
et al.,

Respondents.

Civil Action No. 05-CV-01509 (RMU)

HAMID AL RAZAK, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1601 (GK)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
<hr/>		
SADAR DOE, <i>et al.</i> ,)	
)	
Petitioners,)	
)	
v.	)	Civil Action No. 05-CV-1704 (JR)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	
<hr/>		

**RESPONDENTS' REPLY IN SUPPORT OF MOTION FOR ORDER TO
SHOW CAUSE WHY CASE SHOULD NOT BE DISMISSED FOR LACK OF
PROPER "NEXT FRIEND" STANDING OR, IN THE ALTERNATIVE,
TO STAY PROCEEDINGS PENDING RELATED APPEALS**

Petitioners' opposition memoranda¹ contain an array of misguided arguments and unfounded accusations that fail to rebut the central premise of respondents' motion for order to show cause – petitioners must establish that they have proper standing to sue before the Court can exercise jurisdiction over the above-captioned cases, and petitioners have yet to do so here.

¹ Because the oppositions to respondents' motion for order to show cause filed in the above-captioned cases are substantially similar, respondents are filing this consolidated reply.

The current and former detainees who seek habeas relief on behalf of other individuals detained at Guantanamo Bay have not demonstrated that they possess proper “next friend” standing under the two-pronged standard articulated by the Supreme Court in Whitmore v. Arkansas, 495 U.S. 149, 163-64 (1990). Petitioners attempt to circumvent this critical requirement by complaining that respondents’ conduct somehow necessitated these jurisdictionally deficient petitions, which should thereby compel the Court to ignore established precedent and excuse petitioners from the next friend standing requirements. Petitioners’ position, however, lacks both factual and legal merit. Petitioners bear the burden of establishing why the above-captioned petitions for writ of habeas corpus, not directly authorized by the particular detainees at Guantanamo Bay for whom habeas relief is sought, but instead brought by other detainees claiming to act as their “next friends,” should not be dismissed for lack of proper next friend standing. Absent proper standing to sue, these cases should be dismissed for lack of jurisdiction.

Even if the above-captioned cases are not dismissed, the cases nonetheless should be stayed pending resolution of all appeals in Khalid v. Bush, Boumediene v. Bush, Nos. 04-CV-1142 (RJL), 04-CV-1166 (RJL), 355 F. Supp. 2d 311 (D.D.C. 2005), appeals docketed, Nos. 05-5062, 05-5063 (D.C. Cir. Mar. 2, 2005), and In re Guantanamo Detainee Cases, No. 02-CV-0299, et al., 355 F. Supp. 2d 443 (D.D.C. 2005), appeal on petition for interlocutory appeal, No. 05-5064 (D.C. Cir. Mar. 10, 2005). The pending appeals will address the core issues in these cases and, thus, determine how these cases should proceed, if at all. Further proceedings, including the submission of factual returns, would require the expenditure of significant judicial and other resources that may be avoided as a result of the appeals, and, in any event, such proceedings very likely would have to be revisited or relitigated once the appeals are decided and

the Court of Appeals provides guidance regarding handling of the claims in all of the Guantanamo detainee cases.

ARGUMENT

I. Petitioners Have Failed to Establish Proper “Next Friend” Standing in the Above-Captioned Cases.

The current and former detainees claiming to act as “next friends” for other detainees on whose behalf habeas relief is sought in these cases bear the burden of establishing proper standing to sue as a prerequisite to the Court’s exercise of jurisdiction over their petitions. See Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308 (2004) (“In every federal case, the party bringing the suit must establish standing to prosecute the action.”); Warth v. Seldin, 422 U.S. 490, 517-18 (1975) (“The rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention.”). To establish standing in these “next friend” cases, therefore, petitioners must demonstrate that (1) the detainees for whom habeas relief is sought — the real parties in interest — cannot challenge the legality of their detention themselves; and (2) the purported “next friends” have a significant relationship with each detainee to show that they are truly dedicated to each detainee’s best interests. See Whitmore, 495 U.S. at 163-64. Petitioners have yet to satisfy either requirement.

As explained in the declarations submitted in support of respondents’ motion, as well as in the updated (Second) Declaration of Frank Sweigart, attached hereto as Exhibit A, respondents have provided every detainee with adequate means and opportunity to file a habeas petition in

order to meaningfully challenge the lawfulness of his detention. The Department of Defense (“DoD”) has notified each of its detainees at Guantanamo Bay of his right to file a petition for habeas corpus (“You may ask a civilian judge to look at the lawfulness of your detention . . .”), and has provided each detainee with the address of the United States District Court in the event that he desires to submit his own petition to the Court. See (Second) Declaration of Frank Sweigart, ¶¶ 3-5. Although petitioners would like the Court to believe that the detainees are being held “incommunicado,” in fact, all detainees possess the opportunity to send and receive mail through the Military’s mail delivery and collection system or through the International Committee for the Red Cross. See id., Ex. D. As a result, all detainees may write to friends, family members, or attorneys to request assistance with filing a habeas petition, if they so desire, or they may write and send a *pro se* petition to the Court themselves, as many detainees have. Petitioners have submitted no evidence that the detainees who are purportedly seeking habeas relief in the above-captioned cases are unable to take advantage of these opportunities. Moreover, DoD has taken affirmative steps to facilitate legal representation for detainees who have indicated a desire to challenge the legality of their detention by providing them with a form to complete and mail to the American Bar Association (“ABA”), which has agreed to recruit volunteer counsel for detainees desiring representation.² See (Second) Sweigart Declaration, ¶ 7.

² Petitioners in Nabil, Al Hawary and Shafiq contend that respondents “now freely acknowledge that [detainees] are entitled to be represented by counsel for purposes of seeking a writ of habeas corpus.” See, e.g., Nabil Opp. at 1. By facilitating these detainees’ ability to acquire legal representation, however, respondents have not conceded in any way that all detainees have a “right” to counsel. In Al Odah v. United States, 346 F. Supp. 2d 1 (D.D.C. 2004), the Court explained that, despite there being no absolute right to counsel under the habeas statute, the Court, under its discretionary authority, may appoint counsel to represent detainees if warranted. Id. at 8. Neither the Court’s decision in Al Odah nor respondents’ delivery of the ABA Notification imposes an obligation on respondents, or the Court, to automatically assign

The ABA Notification is not a list of counsel “approved” by respondents, as petitioners erroneously suggest, but merely a notice delivered as mail to detainees who indicate that they wish to challenge their detention, informing them that an independent organization is willing to provide them with legal assistance. See id. Petitioners cannot reasonably argue that the detainees at Guantanamo Bay are unable to seek habeas relief when scores of cases involving well over 200 detainees are pending before the Court,³ including 55 *pro se* petitions that detainees mailed directly to the Court, and at least 17 petitions filed as a result of detainees initiating direct contact with counsel.⁴ Based on this record, and absent any credible and specific evidence to the contrary, petitioners have yet to satisfy the first prong of the Whitmore test.⁵

counsel to every detainee at Guantanamo Bay regardless of a detainee’s desire to pursue legal recourse in court.

³ There are presently 154 cases pending before the Court on behalf of approximately 283 petitioners, although this number includes detainees who filed multiple petitions. Respondents have also been unable to identify more approximately two dozen of these petitioners as detainees at Guantanamo Bay.

⁴ In its motion for order to show cause, respondents erroneously listed Khandan v. Bush, No. 05-CV-1697 (PLF), as a petition authorized through direct contact with counsel. See Resps’ Mot. at 8, n. 6.

⁵ Petitioners improperly blame respondents for certain “unanswered factual questions” regarding the circumstances under which the detainees for whom habeas relief is sought were notified of their ability to seek habeas relief. Not only does this ignore that it is *petitioners’* burden to establish that these detainees are unable to challenge the legality of their detention so as to justify next friend standing in these cases, see Whitmore, 495 U.S. at 154 (“[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue . . .”); id. at 163 (“[N]ext friend’ standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another.”), it disregards the fact that a large number of *pro se* and other petitions have been filed in response to the notices provided to detainees regarding their ability to contact the Court or others to pursue habeas relief.

The purported “next friends” in the above-captioned cases have also yet to demonstrate that they have a “significant relationship” with each detainee such that they are “truly dedicated to the[ir] best interests.” See Whitmore, 495 U.S. at 163-64. Aside from some skimpy “authorizations” attached to the petitions that suggest nothing more than that the purported next friends are aware of other individuals detained at Guantanamo Bay, petitioners have not provided any evidence to show that the detainees seeking “next friend” status have any sort of “significant relationship” with the detainees on whose behalf they claim to seek habeas relief.⁶ The Court is left with no basis from which to conclude that these so-called next friends know the other detainees in any meaningful way so as to ensure that they will genuinely pursue the other detainees’ desires and interests, which is one of the primary motivations behind the next friend standing doctrine. See Whitmore, 495 U.S. at 164 (“These limitations on the ‘next friend’ doctrine are driven by the recognition that it was not intended that the writ of habeas corpus should be availed of, as a matter of course, by intruders or uninvited meddlers, styling themselves next friends.”) (internal quotations omitted). Absent proof that evidences a significant

⁶ Former detainee Moazzam Begg’s supplemental declaration in Al Wirghi v. Bush, No. 05-CV-1497 (RCL), which cites one brief and isolated encounter between Mr. Begg and petitioner Adil Bin Muhammad Al Wirghi in November 2004, does not establish the type of meaningful significant relationship that would justify next friend standing in this case. See Al Wirghi Opp., Ex. 1. Similarly, the memorandum attached to the September 8, 2005 Declaration of Sabin Willett filed in Kiyemba v. Bush, No. 05-CV-1509 (RMU), which provides only rough physical descriptions and possible camp locations of the detainees for whom habeas relief is sought, is also insufficient to demonstrate the existence of a significant relationship that would serve to invoke the Court’s jurisdiction. See Kiyemba Opp. at 9. Moreover, to the extent that counsel argue that assertions by other detainees, Abu Bakker Qassim and Adel Abdul Hakim, prove that the Kiyemba detainees desire to challenge the legality of their detention, such information has no bearing on whether Jamal Kiyemba, the purported next friend in that case, possesses a significant relationship to the detainees on whose behalf he is seeking habeas relief.

relationship, petitioners cannot demonstrate proper next friend standing, and the Court cannot exercise jurisdiction over the petitions in the above-captioned cases.

Because petitioners have not satisfied either requirement for next friend standing as articulated by the Supreme Court in Whitmore, petitioners seek to blame respondents for their own failures by asserting baseless accusations of respondents' allegedly obstructionist behavior which supposedly left petitioners with no recourse but to file jurisdictionally deficient petitions. For instance, petitioners complain that respondents' own notification to detainees advised them that they could "ask a friend" to file petitions on their behalf without also informing them that certain jurisdictional requirements must also be met, and that counsel have been unable to identify family members who can act as next friends because respondents refuse to give them a list of all detainees at Guantanamo Bay. Knowledge of the next friend standing requirements and counsel's ability, or lack thereof, to locate detainees' family members is of no consequence. Petitioners cannot escape the fundamental legal principle that "[i]n every federal case, the party bringing the suit must establish standing to prosecute the action." Elk Grove Unified School District v. Newdow, 124 S. Ct. 2301, 2308 (2004). As demonstrated above, all detainees may write to friends, family members, or attorneys to request assistance with filing a habeas petition, or they may submit a *pro se* petition to the Court themselves. Counsel for petitioners in the above-captioned cases chose to file petitions through other detainees purporting to act as next friends,⁷ and now petitioners bear the burden of establishing that these current and former

⁷ Respondents do not take the position that detainees can *never* act as proper next friends to other detainees, but argue only that the detainees who purport to do so in these cases must establish their next friend status as a precondition to the Court's exercise of jurisdiction. Thus, respondents' acknowledgment that other detainees may serve as "legitimate next friends" in their motion to dismiss filed in John Does 1-570 v. Bush, No. 05-CV-0313 (CKK), is not inconsistent

detainees who seek habeas relief on behalf of other individuals detained at Guantanamo Bay possess proper next friend standing under the Supreme Court's Whitmore test.

Petitioners further contend that respondents' challenge to proper next friend standing in these cases serves only to needlessly delay proceedings since the detainees for whom habeas relief is sought are likely to challenge their own detention anyway. Petitioners erroneously assume, however, that all of the detainees at Guantanamo Bay want to challenge the legality of their detention, and cannot do so simply because respondents have prevented them from doing so. The facts demonstrate otherwise. As explained above, DoD has notified each detainee of his right to challenge the legality of his detention, and with their mail privileges, the detainees are free to seek assistance from friends, family, and attorneys to pursue habeas relief or to send their own habeas petition to the Court themselves. See (Second) Sweigart Declaration, ¶ 3-5. The fact that scores of cases involving well over 200 detainees are pending before the Court establishes that respondents have not confined the detainees in conditions that preclude them from vindicating their right to challenge the lawfulness of their detention and confirms that the detainees can effectively access the courts and counsel if they choose to do so. While

with respondents' challenge to next friend standing here. Respondents also note that the recent and rising trend of detainees, such as Omar Deghayes, submitting next friend "authorizations" containing long lists of any other detainees that they can remember having contact with, without even attempting to satisfying Whitmore's jurisdictional requirements, is wholly improper. Counsel's promotion of such practices, as well as their complaint that DoD has not provided them a list of all Guantanamo detainees, demonstrate that counsel seek through next friend cases such as these merely to further the cause of bringing habeas petitions on behalf of every detainee they learn about regardless of a detainee's particular wishes or the available avenues for detainees to initiate habeas suits themselves. See infra.

respondents have not prohibited detainees from exercising their legal rights,⁸ respondents also do not have any obligation to actively prod these detainees to take advantage of their ability to file habeas petitions in U.S. courts. Some detainees simply may not want the U.S. courts to review the legality of their detention.⁹ Petitioners' insinuation that respondents' motion for order to show cause is solely an effort to obstruct detainees from challenging the legality of their detention is preposterous. It is petitioners who have yet to satisfy basic requirements regarding their standing to sue in the above-captioned cases and now attempt to sidestep the jurisdictional issue by blaming respondents for raising it at all. It is well-established that petitioners must

⁸ The Declaration of Clive A. Stafford Smith, submitted in support of petitioners' opposition memoranda in several of the above-captioned cases, attempts to malign respondents' actions in virtually every aspect of the detention of individuals at Guantanamo Bay and the litigation of the detainees' petitions for habeas corpus. Mr. Smith, who represents all of the improper next friends in the above-captioned cases, bases his lengthy diatribe on nothing more than various generalized allegations by unspecified detainees and non-specific hearsay. In particular, his accusations that respondents have intentionally interfered with detainees' access to counsel so as to discourage them from seeking habeas relief and prohibiting attorneys from visiting Guantanamo Bay are patently false. While respondents do not allow unauthorized attorneys to travel to Guantanamo Bay to solicit detainees, many legitimately retained attorneys have complied with the counsel access procedures contained in the Protective Order and have visited Guantanamo Bay to meet with their detainee clients. The claim that military personnel are attempting to undermine the relationship between detainees and their attorneys has already been squarely rebutted by a sworn declaration in the Al Odah case. See Declaration of Esteban Rodriguez, filed on May 9, 2005 as Exhibit 2 to Respondents' Opposition to Petitioners' Motion for Writ of Injunction in Al Odah v. United States, No. 02-CV-0828 (CKK) (attached hereto as Exhibit B) ("The Department of Defense does not permit interrogators or other personnel to interfere with the relationship between any detainee and his lawyer. This would include a prohibition on impersonating a lawyer, on making disparaging comments about the lawyer, and on retaliating against a detainee for having met with a lawyer or being involved in habeas corpus litigation.").

⁹ See, e.g., Declaration of Tony F. De Alicante, filed on May 6, 2005 as Exhibit C to Reply in Support of Respondents' Motion to Dismiss Petition in John Does 1-570 v. Bush, No. 05-CV-0313 (CKK) (stating that as of May 5, 2005, four different detainees refused to accept legal mail from their attorneys, and several have stated that they do not want to be represented by counsel).

demonstrate proper next friend standing under Whitmore in order for the Court to exercise jurisdiction over these petitions and for the cases to proceed in any fashion.

Thus, petitioners' suggestion that counsel should be allowed to visit the detainees for whom habeas relief is sought in order to discover if they desire to pursue habeas relief, and thereby render respondents' motion for order to show cause moot, effectively puts the cart before the horse. Counsel cannot avail themselves of the counsel access procedures contained in the Protective Order until they first establish that proper jurisdiction over the case exists. Counsel elected to file these petitions through other detainees purporting to serve as next friends, and are obligated to satisfy the requirements for next friend standing before any proceedings in these cases can move forward. Whether the detainees later authorize representation by counsel as required by the Protective Order does not solve the threshold standing question. Jurisdiction must be established and these cases must be properly before the Court before any proceedings may commence, including counsel visits to Guantanamo Bay.¹⁰

Finally, petitioners mistakenly elevate the difficulties noted by respondents in identifying petitioners as detainees at Guantanamo Bay to the primary basis for respondents' motion for order to show cause. Respondents raise the identification issue because it is a problem arising

¹⁰ To the extent that counsel are requesting expedited processing of security clearances to facilitate visits to Guantanamo Bay, not only are such visits inappropriate until the threshold standing issue is resolved, but respondents have no control over the timing of security clearance applications. Processing of security clearances for petitioners' counsel is handled by the offices of the Department of Justice, Litigation Security Division (i.e., the Court Security Officers), who process all applications for petitioners' counsel in the Guantanamo litigation in an expedited fashion. This process takes time, however, given the large number of petitioners' counsel who have applied for security clearances across the more than 150 pending Guantanamo habeas cases and the burdens associated with the application process, including substantive background investigations.

out of the phenomenon of petitions filed by improper next friends, but it is not the reason why respondents filed their motion.¹¹ Rather, respondents are requesting an order to show cause because petitioners have failed to demonstrate that they have proper next friend standing, without which the Court lacks jurisdiction over these cases. Petitioners should not be excused from the requirements for next friend standing articulated by the Supreme Court in Whitmore. If petitioners are unable to demonstrate that the petitions were filed by legitimate next friends, jurisdiction over the petitions is absent, and the petitions must be dismissed.

II. If the Court Does Not Dismiss the Above-Captioned Cases, They Should be Stayed Pending Resolution of the Appeals of Decisions in the Other Guantanamo Detainee Cases Adjudicating Common Issues.

If the Court finds that the petitions in the above-captioned cases were filed by legitimate next friends,¹² the Court should stay proceedings in these cases pending the resolution of the appeals in Khalid, Boumediene and In re Guantanamo Detainee Cases, which will determine whether and how these cases should proceed. The petitions in these cases raise legal issues that were squarely addressed by the opinions in In re Guantanamo Detainee Cases, Khalid, and

¹¹ Indeed, in cases where next friend standing was found not to exist, identification of the real party in interest was never in doubt. See, e.g., Whitmore v. Arkansas, 495 U.S. 149 (1990) (inmate unsuccessfully attempting to act as next friend on behalf of another identified inmate).

¹² Even if the Court finds that petitioners have established next friend standing so that the Court can exercise jurisdiction over the petitions, the next friends should not be permitted to serve in this capacity beyond the time when counsel are permitted to meet with the detainees for whom habeas relief is sought. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 8, 2004), § III.C. (permitting counsel in proper next-friend cases two visits with a detainee before an authorization of representation by the detainee must be provided to respondents). At that time, counsel should determine these detainees' wishes concerning pursuing a challenge to their detention through the habeas petitions in these cases, such that the cases can then either be converted into direct petitions or be dismissed.

Boumediene and that are raised in the appeals, including: (1) whether the petitioners have stated valid claims under the Fifth Amendment to the United States Constitution and, if so, whether the procedures implemented by respondents to determine the status of petitioners violate their Fifth Amendment rights; (2) whether the petitioners have stated valid claims under the Third Geneva Convention;¹³ and (3) whether the petitioners have stated valid claims based on various other legal theories, including other Constitutional provisions, other international treaties, Military regulations, the Administrative Procedure Act, the Alien Tort Statute, and customary international law.¹⁴ It makes no sense for proceedings related to the merits of these cases to go forward when decisions from the D.C. Circuit on the related Guantanamo detainee appeals will determine the legal analyses applicable to these cases and, indeed, whether and how these cases should proceed.¹⁵

¹³ In Hamdan v. Rumsfeld, 415 F.3d 33, 40 (D.C. Cir. 2005), the D.C. Circuit held that the Third Geneva Convention does not give rise to claims enforceable in court.

¹⁴ Petitioners in Nabil, Al Hawary and Shafiq contend that a stay is not appropriate in these cases because the petitions challenge the legality, and alternatively, allege the violation, of an Order of the President dated November 13, 2001. See, e.g., Nabil Opp. at 7 (citing Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001)). Petitioners' detention as enemy combatants is not pursuant to that Order, however; petitioners are detained pursuant to the President's general authority as Commander in Chief, the congressional Authorization for Use of Military Force, and the international law of war. Furthermore, to the extent that petitioners in these cases challenge the legality of the Order in permitting trials of certain detainees by military commission, the D.C. Circuit's decision in Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), has already addressed such claims.

¹⁵ Petitioners' opposition memoranda in Kiyemba and Sadar Doe contain a variety of allegations and arguments surrounding counsels' subjective belief that one or more petitioners in those cases has been determined not to be an enemy combatant. As respondents stated in their motion for order to show cause in Kiyemba, however, of the petitioners whom respondents have been able to arguably identify as of this date, all are held as enemy combatants. Further, as demonstrated by Respondents' Response to the Court's Order to Show Cause in Sadar Doe, filed September 21, 2005, both petitioners in that case are being held as enemy combatants.

In seeking a stay to the extent the next friend petitioners are determined to satisfy the applicable requirements, however, it makes no sense for the government to process and submit factual returns¹⁶ with respect to petitioners when the D.C. Circuit will be considering the proper scope of these habeas proceedings, including whether the claims can be dismissed without reference to specific factual returns. See Khalid, 355 F. Supp. 2d 311 (dismissing petitioners' claims in their entirety). Even if counsel had access to factual returns, they would not be able to share classified information in the returns with petitioners. See Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba in In re Guantanamo Detainee Cases, No. 02-CV-0299, et al. (D.D.C. Nov. 8, 2004), ¶ 30. Thus, there is no reason why counsel need access to factual returns at this time.¹⁷

Moreover, the submission of factual returns which, in any event, may ultimately be unnecessary, burdens the government's resources and risks the inadvertent disclosure of classified information. Each factual return must be obtained from the Department of Defense, and then reviewed by agencies who provided source information to DoD to ensure that information disclosed to counsel in the returns is in accordance with all applicable statutes, regulations and Executive Orders. Respondents must then prepare both public and classified

¹⁶ A factual return for a petitioner in a Guantanamo detainee case typically has consisted of the record of proceedings before the Combatant Status Review Tribunal that confirmed petitioner's status as an enemy combatant properly subject to detention. The factual return is separate from briefing on legal issues in the cases. Factual returns include both classified and unclassified material.

¹⁷ In this vein, various Judges of this Court have declined to require factual returns during the pendency of the stay. See, e.g., Sliti v. Bush, No. 05-CV-0429 (RJJ) (dkt. no. 5); Imran v. Bush, No. 05-CV-0764 (CKK) (dkt. no. 6); Attash v. Bush, No. 05-CV-1592 (RCL) (dkt. no. 12).

versions of the factual returns for submission to the Court and counsel. Each return can range from dozens to hundreds of pages, depending upon the circumstances. Thus, respondents face an immense logistical burden to process and file the returns, especially on the short, simultaneous schedules being requested by petitioners in the various cases. Further, submission of these returns vastly expands access to classified information contained in the returns, thereby increasing the risks of inadvertent or other disclosure or compromise of the information. These burdens and risks, however, could be rendered completely unnecessary, depending on the outcome of the appeals. Cf. Order Denying Motion for Reconsideration of Order Granting Stay Pending Appeal in *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 482 (staying cases so as to avoid expenditure of “substantial resources” and imposition of “significant burdens” that might not be necessary depending on outcome of appeal).

Although certain Judges of this Court have ordered respondents to submit factual returns in cases that are otherwise stayed, respondents oppose the submission of factual returns in the above-captioned cases for the reasons stated herein. If the petitions are not dismissed for lack of proper next friend standing and submission of factual returns were to go forward at all, it could only be done pursuant to a coordinated and reasonable schedule, taking account of the fact that petitioners in all the recently filed cases are seeking factual returns and recognizing the logistical burdens posed by an undertaking to produce returns in the cases. In such circumstances, a schedule for the rolling production of factual returns in these case (and potentially other cases) over the next 10 to 12 weeks would be appropriate. In a number of other recent cases, the government has been given between 90 and 120 days to file factual returns, and respondents request that the Court impose a similar schedule, if the Court determines that these cases are

properly filed and that factual returns should be provided. See e.g., Al-Joudi, No. 05-CV-0301 (GK) (dkt. no. 26) (imposing 90-day schedule); Al-Wazan, No. 05-CV-0329 (PLF) (dkt. no. 37) (imposing 90-day schedule); Al-Anazi, No. 05-CV-0345 (JDB) (dkt. no. 21) (imposing 120-day schedule); Ameziane, No. 05-CV-392 (ESH) (dkt. no. 12) (imposing 90-day schedule); Qayed, No. 05-CV-0454 (RMU) (dkt. no. 5) (imposing 90-day schedule); Battayav, No. 05-CV-0714 (RBW) (dkt. no. 12) (imposing 120-day schedule).

CONCLUSION

For the reasons stated, petitioners have not demonstrated proper next friend standing. Even if petitioners are able to establish proper standing, the Court should stay further proceedings in these cases, except as noted above, pending resolution of the appeals of Judge Leon's decision in Khalid and Boumediene and Judge Green's January 31, 2005 decision in In re Guantanamo Detainee Cases.

Dated: September 22, 2005

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

DOUGLAS N. LETTER
Terrorism Litigation Counsel

/s/ Preeya M. Noronha
JOSEPH H. HUNT (D.C. Bar No. 431134)
VINCENT M. GARVEY (D.C. Bar No. 127191)
TERRY M. HENRY
JAMES J. SCHWARTZ
PREEYA M. NORONHA
ROBERT J. KATERBERG
NICHOLAS J. PATTERSON

ANDREW I. WARDEN
EDWARD H. WHITE
Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W. Room 7144
Washington, DC 20530
Tel: (202) 514-4107
Fax: (202) 616-8470

Attorneys for Respondents

SECOND DECLARATION OF FRANK SWEIGART

I, Frank Sweigart, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am the Deputy Director of the Office for the Administrative Review of the Detention of Enemy Combatants (OARDEC) at U.S. Naval Base Guantanamo Bay, Cuba. I have been in this position since June 2004. In this role I assist OARDEC's Director with all aspects of the mission of OARDEC, which is to conduct Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs). The purpose of the CSRTs is to review relevant and reasonably available information in the government's possession and conduct hearings on detainees under the control of the Department of Defense (DoD) at U.S. Naval Base Guantanamo Bay, Cuba, and to determine whether a detainee continues to meet the criteria for designation as an enemy combatant. The purpose of the ARBs is to review all relevant and reasonably available information on enemy combatants, conduct hearings, and make a recommendation to the Designated Civilian Official, currently the Secretary of the Navy, on whether an enemy combatant should continue to be detained because he is a threat to the United States or its allies or there are other factors bearing upon the need for continued detention such as law enforcement interest or intelligence value.

2. This declaration is provided to update the status of the steps taken by the Department of Defense (DoD) to notify the detainees at U.S. Naval Base Guantanamo Bay, Cuba, of their right to challenge the legality of their detention by filing *habeas corpus* petitions in federal court, as described in the First Declaration of Frank Sweigart, executed on August 31, 2005. I make these statements based upon my personal knowledge and upon information made available to me in the performance of my official duties.

3. In December 2004, DoD began, on a rolling basis, to notify detainees who had been confirmed to be enemy combatants through the CSRT process that: the CSRT confirmed them to be enemy combatants; they were now eligible for consideration by an ARB to determine if they still pose a threat to the United States or its allies; and they could file a petition for writ of *habeas corpus* in federal court if they wanted to challenge the lawfulness of their detention. The notification tells the detainees that they have the option of asking a friend, family member, or lawyer to file a petition on their behalf. They are also provided with the address of the United States District Court for the District of Columbia in the event that they choose to submit a *pro se* *habeas* petition. *See* Exhibit A. CSRT proceedings concluded in March 2005. Every detainee confirmed to be an enemy combatant through the CSRT process and who is eligible for consideration by an ARB has received the notice described above.

4. There are presently 14 detainees not eligible for consideration by an ARB because the President of the United States ordered them triable by Military Commission under the Military Order of November 13, 2001. Each of the 14 detainees has been informed that the CSRT determined him to be an enemy combatant and that he can challenge the lawfulness of his detention by filing a petition for a writ of *habeas corpus* in federal court if he wants to do so. These detainees likewise have been provided with the address of the United States District Court for the District of Columbia. *See* Exhibit B.

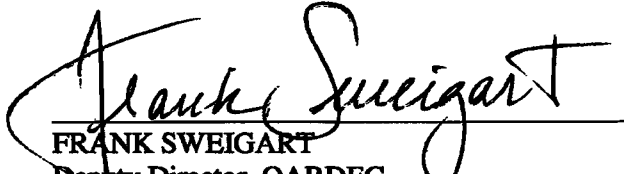
5. DoD has also notified each detainee whom the CSRT has determined to no longer be an enemy combatant that he can file a petition for writ of *habeas corpus* in federal court if he wants to challenge the lawfulness of his detention. These detainees likewise have been provided with the address of the United States District Court for the District of Columbia. *See* Exhibit C.

6. DoD is aware of 55 *pro se* petitions written by detainees or, in the case of illiterate detainees, dictated by detainees to an Assisting Military Officer involved in the ARB process. All of these *pro se* petitions were processed pursuant to the military's standard review procedures for outgoing detainee mail, *see* Declaration of 1LT Wade M. Brown, executed March 17, 2005 (attached hereto as Exhibit D), and were mailed to the District Court.

7. As a result of discussions between DoD and the American Bar Association (ABA), the ABA has agreed to recruit volunteer counsel for *pro se* petitioners and other detainees who may desire representation. DoD has delivered to all *pro se* petitioners who are not already represented by counsel a notification which advises them that the ABA is willing to find them a lawyer to assist them with a petition for writ of *habeas corpus*. The notification provides the detainees with the address of the ABA and a form requesting representation that they may complete and mail directly to the ABA in the event that they choose to seek the assistance of counsel. *See* Exhibit E. Each notification was translated into a language that the detainee can understand and delivered to that detainee as mail through the mail delivery system at Guantanamo Bay. If a detainee indicates that he is unable to read the notification, a guard (if the notification is in English) or translator (if the notification is not in English) will read the notification to that detainee. DoD will continue to deliver this notification in this manner, on an ongoing basis, to all *pro se* petitioners who are not already represented by counsel, and to other detainees who request the assistance of counsel.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 19 Sep 05.


FRANK SWEIGART
Deputy Director, OARDEC

NOTIFICATIONS

1. A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you.
2. An Administrative Review Board (ARB) will now be held to determine whether you still pose a threat to the United States or its allies. The ARB will consider all relevant and reasonably available information. If the ARB decides you no longer pose a threat, you may be released from detention.
3. You may attend the ARB proceeding and present information about yourself to ARB members. If you believe you do not pose a threat to the United States or its allies, we recommend you immediately gather any information that you believe will prove that you are no longer a threat and why you should be released from detention.
4. The ARB will consider written statements from family members or other persons who can explain why you are no longer a threat. You may also present a written or oral statement at the ARB. Unlike the CSRT, witnesses are not allowed to testify during the ARB. An American officer (called an Assisting Military Officer) will help you prepare your case if you want him to. You do not have to attend the ARB, and you do not have to say anything if you do attend. The ARB will be conducted whether or not you choose to attend.
5. In addition, you have been notified that you may challenge your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
6. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions may be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition.

7. Please talk to your Assisting Military Officer if you have any questions about this notification. Your assigned Assisting Military Officer will meet with you later.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT A

NOTIFICATIONS

1. A Combatant Status Review Tribunal (CSRT) has determined that you are an enemy combatant. Because you are an enemy combatant, the United States may continue to detain you.
2. In addition, you have been notified that you may challenge the lawfulness of your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
3. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions should be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT B

NOTIFICATION

1. You have been notified previously that you may challenge your detention in a United States court. The following procedures are available if you want to challenge your detention in a U.S. court.
2. You may ask a civilian judge to look at the lawfulness of your detention through a process called a *petition for a writ of habeas corpus*. You may ask a friend or family member or a lawyer to file such a petition with the court. If you do not have a lawyer or a family member or friend who could file this petition for you, you may file your own petition. According to prior court rulings, petitions should be sent to:

United States District Court for the District of Columbia
333 Constitution Avenue, N.W.
Washington, DC 20001

If you do not wish to file a petition, you do not have to do so. However, a court will only consider your case if you file a petition or if one is filed by a lawyer, friend or family member on your behalf.

Detainee ISN: _____ Date: _____

Signature of Officer Serving Notice: _____

Printed Name of Officer Serving Notice: _____

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOES 1-570,
Unidentified Detainees
Guantanamo Bay Naval Station
Guantanamo Bay, Cuba,

Petitioners,

v.

GEORGE W. BUSH,
President of the United States, *et al.*,

Respondents.

Civil Action No. 05-CV-0313 (CKK)

DECLARATION OF 1LT WADE M. BROWN

I, Wade M. Brown, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I am a First Lieutenant in the New Jersey Army National Guard and am currently serving as the Officer in Charge (OIC) of the S-2 Section within the Joint Detention Operations Group at Guantanamo Bay, Cuba. I have held this position since October 2004. Prior to becoming OIC, I was the Assistant OIC from July 2004 through September 2004. In both of these positions, part of my responsibilities are to report directly to the JTF and JDOG Commanders on all issues related to Detainee Mail operations, to include the proper handling and processing of mail sent to and from detainees, processing times, force protection screening and redaction. I oversee the 15 individuals in the screening and processing units and work in the same building as such. The following statements provide a general overview of the mail privileges available to these detainees at Guantanamo Bay. I make these statements based upon

my personal knowledge and upon information made available to me in the performance of my official duties.

2. Each individual detained by the Department of Defense at Guantanamo Bay is given the opportunity to send and receive mail. Detainees cannot lose mail privileges for any reason, including as part of disciplinary action or interrogation. However, some detainees have affirmatively refused to send or receive any mail. Also, in rare cases, pens are temporarily removed from some detainees when appropriate members of the detainee medical care staff determine the detainee may use the pen to inflict self-harm.

3. In the six-month period from September 2004 through February 2005, the mail processing unit processed approximately 14,000 pieces of mail sent to or by detainees at Guantanamo Bay.

4. There are two methods for detainees to send and receive mail — through the mail delivery and collection system administered by the United States Military, or through the International Committee for the Red Cross (“ICRC”). Legal mail between habeas counsel and the detainees is not processed through either of these two methods, instead that mail is handled under the procedures set forth in the federal court order that covers the habeas cases.


5. The Military provides each detainee with two sheets of stationery, four postcards, and six envelopes per month. See Exhibit A. Each detainee is also provided with a soft pen, although certain detainees are not permitted to keep the pens in their cells for security reasons. These detainees are provided with pens only during the times when they are writing letters. Military officers collect and deliver mail from the detainees approximately six times per month. After mail is collected from the detainees, it is taken to a processing unit. At the processing unit,

each piece of mail is translated into English if necessary, screened for inappropriate materials and redacted accordingly, and placed in a U.S. Postal Service receptacle affixed with the required postage. This entire process takes approximately fourteen days on average. The processing unit clears approximately 75 pieces of mail each day. Mail that is sent to a detainee must also be cleared through the processing unit and stamped "Approved by U.S. Forces" before it can be delivered to the detainee to whom it is addressed. Incoming mail is also typically processed within fourteen days on average.

6. The ICRC also facilitates the delivery of detainee mail to and from Guantanamo Bay. The ICRC pays approximately four visits each year to the detainees for approximately 5-6 weeks per visit. The ICRC provides its own stationery and envelopes to the detainees (although detainees are still required to use Military-issued pens), collects the mail from the detainees, and delivers it to the processing unit. After the mail is cleared by the processing unit, it is returned to the ICRC, who delivers it to the intended recipients. The ICRC also collects mail from outside Guantanamo Bay and delivers the mail directly to the detainees after it is cleared through the processing unit.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 17, 2005.



WADE M. BROWN
First Lieutenant, NJARNG

EXHIBIT A

EXHIBIT D

Country where posted _____
Name of Camp _____
Date and Place of Birth _____
Internment Serial Number _____
Name (Last, first MI) _____

SENDER:

(Fold on this line)

MAIL

LETTER

Language _____

To _____

Street _____

City _____

Country _____

Province or Department _____

(Fold on this line)

DO NOT WRITE HERE

(Fold on this line)

FORM 2667-R, May 82

EDITION OF 1 JUL 63 IS OBSOLETE

For use of this form, see
the proponent agency is DCSPER.

EXHIBIT D

DO NOT WRITE BEYOND HEAVY LINES

Reverse of DA FORM 2667-R, May 82

EXHIBIT D

DETAINEE CAMP DELTA Washington, DC 20353 USA	
SENDER	TO:
NAME (Last, first, MI)	
INTERMENT SERAL NUMBER	STREET
DATE AND PLACE OF BIRTH	CITY
NAME OF CAMP	COUNTRY
COUNTRY WHERE POSTED	PROVINCE OR DEPARTMENT

DA FORM 2668, JAN 2004

Replaces DA Form 2668-R, May 1982, which is

APD V1.01

POST CARD For use of this form, see AR 190-8; the proponent agency is PMG.	DATE
LANGUAGE	POWER SERVED
<i>WRITE BETWEEN LINES AND AS LEGIBLY AS POSSIBLE</i>	

DA FORM 2668, JAN 2004

APD V1.01

EXHIBIT D

DETAINEE
CAMP DELTA
Washington, DC 20353
USA

EXHIBIT D

NOTIFICATION

1. You have been notified previously that you may challenge your detention in a United States court by asking a civilian judge to look at the lawfulness of your detention through a process called a *petition for writ of habeas corpus*. You were told that such a petition could be filed for you, or you could ask a family member, friend, or lawyer to file one for you.
2. Should you desire the assistance of a lawyer in filing a petition or in helping with a petition you have already sent on your own to the court, the American Bar Association, the world's largest association of lawyers, will find an experienced, independent civilian lawyer to help you without any fee or payment. The lawyer they find will represent your interests and will zealously assert your case before the civilian court.
3. If you would like the assistance of such a lawyer, you can fill out the attached form and send it to the following address:

Robert D. Evans, Esquire
American Bar Association
740 15th Street, N.W.
Washington, D.C. 20005
- Arrangements will then be made for the lawyer to consult with you and represent your interests in the civilian court. The lawyer's job will be to assist you. The lawyer will not work for the military or the government.
4. If you are unable to write, you will receive assistance in filling out the form. Your words will be put on the form.

EXHIBIT E

I, _____, wish to
(write name)

have a civilian lawyer represent me and assist me with a Petition for
Writ of Habeas Corpus in the civilian courts of the United States. I
request that the American Bar Association find a lawyer who will
represent my best interests.

I am a citizen of the country of _____.

I speak the following language(s): _____

Signed: _____
(sign name)

Date: _____

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FAWZI KHALID ABDULLA FAHAD)
AL ODAH., et al.,)

Petitioners,)

v.)

UNITED STATES OF AMERICA, et)
al.,)

Respondents.)

Civil Action No. 02-0828 (CKK)

DECLARATION OF ESTEBAN RODRIGUEZ

Pursuant to 28 U.S.C. § 1746, I, Esteban Rodriguez, hereby declare:

1. I am a civilian employee of the United States Department of Defense (DoD). I currently serve as Director of the Joint Intelligence Group ("JIG") of the Joint Task Force – Guantanamo Bay Naval Base ("JTF-GTMO"). The JIG's mission is to collect intelligence information from detained enemy combatants in the Global War on Terror who are deemed to be of strategic intelligence value. I have served as Director of the JIG since 17 July 2003. In this capacity, I am responsible for managing and overseeing interrogation operations at the detention facility. I joined the United States as an interrogator in 1979, and have been in the human intelligence (HUMINT) business ever since. I have overseen interrogation and debriefing activities for DoD in the continental United States, Europe and now Guantanamo. I have personal knowledge of the matters stated herein.

2. The Department of Defense does not permit interrogators or other personnel to interfere with the relationship between any detainee and his lawyer. This would include a prohibition on impersonating a lawyer, on making disparaging comments about the lawyer, and on retaliating against a detainee for having met with a lawyer or being involved in habeas corpus litigation.

3. I have reviewed the Declaration of Thomas Wilner, submitted as part of this litigation. His declaration contends that a female interrogator named Megan has told Faziz Al Kandari not to trust his lawyers because they are Jewish and that she informed Mr. Al Kandari she was angry at him for talking to his lawyers and that he would be tortured if he went back to Kuwait. I have spoken with the female interrogator in question and she has reviewed these allegations in Mr. Wilner's declaration. She has

informed me that these allegations are false and that she never made disparaging comments about the lawyers during conversations with Mr. Al Kandari, nor has she ever done anything to interfere in the relationship between Mr. Al Kandari and his lawyer. This interrogator has been assigned to Mr. Saad Al-Azmi since well before his lawyers began visiting Guantanamo Bay late in 2004. She has likewise informed me that she never made disparaging comments about the lawyers during conversations with Mr. Al-Azmi, nor has she ever done anything to interfere in the relationship between Mr. Al-Azmi and his lawyers.

4. Mr. Wilner's declaration also states that an unidentified male interrogator told Fouad Mahmoud Al Rabiah on numerous occasions that he should not trust his lawyers because they are Jewish and that if he agreed to let the lawyers represent him, he will be held at Guantanamo forever. I have spoken with the interrogator who has been assigned to Mr. Al Rabiah since well before his lawyers began visiting Guantanamo Bay late in 2004, and he has reviewed these allegations in Mr. Wilner's declaration. He has informed me that these allegations are false and that he never made disparaging comments about the lawyers with Mr. Al Rabiah, nor has he ever done anything to interfere in the relationship between a detainee and his lawyer.

5. Other than the interrogators mentioned above, no other individuals have interrogated Mr. Al-Azmi or Mr. Al Rabiah since well before their lawyers began visiting Guantanamo Bay late in 2004.

6. The interrogators referred to above are active duty military or are contractors and, as such, are subject to the Uniform Code of Military Justice ("UCMJ"). Interrogators who are contractors are bound to the UCMJ as a condition of their contract.

The UCMJ prohibits the making of false official statements, 10 U.S.C. section 907.

Were the interrogators to have falsified their responses to my inquiries described above, they would potentially be subject to discipline and other punitive measures under the UCMJ or otherwise.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 5, 2005



ESTEBAN RODRIGUEZ

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUFYIAN BARHOUMI,
 Detainee,
 Guantánamo Bay Naval Station
 Guantánamo Bay, Cuba;

JAMAAL KIYEMBA,
 as Next Friend of SUFYIAN
 BARHOUMI;

Petitioners/Plaintiffs,

v.

GEORGE W. BUSH,
 President of the United States
 The White House
 1600 Pennsylvania Ave., N.W.
 Washington, D.C. 20500;

DONALD RUMSFELD,
 Secretary, United States
 Department of Defense
 1000 Defense Pentagon
 Washington, D.C. 20301-1000;

ARMY BRIG. GEN. JAY HOOD,
 Commander, Joint Task Force - GTMO
 JTF-GTMO
 APO AE 09360; and

ARMY COL. MIKE BUMGARNER,
 Commander, Joint Detention
 Operations Group - JTF-GTMO,
 JTF-GTMO
 APO AE 09360,

Respondents/Defendants.

CIVIL ACTION NO.

05-cv-1506(RMC)

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Sufyian Barhoumi¹ (“Barhoumi”) seeks a Writ of Habeas Corpus. A citizen of Algeria, he acts on his own behalf and through his Next Friend, Jamaal Kiyemba, his co-detainee and friend. He is a civilian wrongly classified as an “enemy combatant” by the President of the United States, and is being held virtually incommunicado in military custody at the United States Naval Station at Guantánamo Bay, Cuba (“Guantánamo Bay”), without basis, without access to counsel, and without being afforded any fair process by which he might challenge his detention. Petitioner Barhoumi is being held by color and authority of the Executive, and in violation of the Constitution, laws and treaties of the United States as well as customary international law. Accordingly, this Court should issue a Writ of Habeas Corpus compelling Respondents either to release Petitioner Barhoumi or to establish in this Court a lawful basis for Petitioner Barhoumi’s detention and provide related injunctive and declaratory relief.

Pursuant to the President’s authority as Commander-in-Chief, his authority under the laws and usages of war, or under the November 13, 2001 Military Order, Respondents George W. Bush, President of the United States, Donald H. Rumsfeld, U.S. Secretary of Defense, Army Brigadier General Jay Hood, Commander of Joint Task Force-GTMO, and Army Colonel Mike Bumgarner, Commander, Joint Detention Operations Group, Joint Task Force-GTMO, are either ultimately responsible for or

¹ The original petition was filed under the same Barhoumi (Last Name Unknown). At the time the original Petition was filed, counsel were not aware of Petitioner’s complete name, but used the common name provided to counsel by Next Friend, Jamal Kiyemba.

have been charged with the responsibility of maintaining the custody and control of the detained Petitioner at Guantánamo Bay.

SECTION I
JURISDICTION AND VENUE

1. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §§ 2241(c)(1), (c)(3) and 2242. Petitioners further invoke this Court's jurisdiction under: 28 U.S.C. §§ 1331, 1350, 1651, 2201, and 2202; 5 U.S.C. § 702; Articles I and II of the United States Constitution; and the Fifth, Sixth, and Eighth Amendments to the United States Constitution. Petitioners also rely on Rule 57, Fed.R.Civ.P.

2. This Court is empowered under 28 U.S.C. § 2241 to grant this Writ of Habeas Corpus, and to entertain the Petition filed by Jamaal Kiyemba, the Next Friend of Petitioner Barhoumi, under 28 U.S.C. § 2242.

3. This Court is further empowered to declare the rights and other legal relations of the parties herein by 28 U.S.C. § 2201, and to effectuate and enforce declaratory relief by all necessary and proper means by 28 U.S.C. § 2202, as this case involves an actual controversy within the Court's jurisdiction, and to issue all writs necessary or appropriate in aid of its jurisdiction by 28 U.S.C. § 1651.

4. Venue is proper in the District of Columbia pursuant to 28 U.S.C. § 1391 because at least one of the respondents resides in the District, a substantial part of the events giving rise to the claim occurred in the District, at least one respondent may be found in the District, and all respondents are either officers or employees of the United States, or agencies thereof, and acting in their official capacities.

SECTION II
PARTIES

5. Petitioner Barhoumi is an Algerian citizen who is presently incarcerated at Guantánamo Bay and held in Respondents' unlawful custody and control. *See* attached Affidavit of Jamaal Kiyemba at ¶1.

6. Petitioner Jamaal Kiyemba is Petitioner Barhoumi's co-detainee and friend. *Id.* at ¶1 and attachment. He is an Algerian citizen. Because his co-detainee and friend has been denied access to legal counsel and to the courts of the United States, Jamaal Kiyemba acts as his Next Friend, per 28 U.S.C. §§ 2241 and 2242. *Id.* at ¶1.

7. Respondent George W. Bush is the President of the United States and Commander-in-Chief of the United States Military. Petitioner Barhoumi is being detained pursuant to President Bush's authority as Commander-in-Chief, under the laws and usages of war or, alternatively, pursuant to the Military Order of November 13, 2001: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57,833 (November 13, 2001) ("Military Order"). President Bush is responsible for Petitioner Barhoumi's unlawful detention and is sued in his official capacity.

8. Respondent Donald Rumsfeld is the Secretary of the United States Department of Defense. Pursuant to the President's authority as Commander-in-Chief, under the laws and usages of war or, alternatively, pursuant to Sec. 3 of the Military Order, Respondent Rumsfeld has been charged with the responsibility of maintaining the custody and control of Petitioner Barhoumi. He is sued in his official capacity.

9. Respondent Brigadier General Jay Hood is the Commander of Joint Task Force - GTMO, the task force running the detention operation at Guantánamo Bay. He has supervisory responsibility for Petitioner Barhoumi and is sued in his official capacity.

10. Respondent Army Colonel Mike Bumgarner is the Commander of the Joint Detention Operations Group and the Joint Task Force - GTMO detention camps, including the U.S. facility where Petitioner Barhoumi is presently held. He is the immediate custodian responsible for Petitioner Barhoumi's detention and is sued in his official capacity.

11. Respondents are directly responsible for any activities undertaken by or under the supervision of any agents or employees acting on their behalf, or of agents or employees of private contractors ("contractor employees") with whom any agency under Respondents' authority or supervision has contracted for the provision of services at Guantánamo Bay. All references to Respondents' actions in this Petition include activities performed by Respondents' agents or employees, other government agents or employees or contractor employees.

SECTION III **STATEMENT OF FACTS**

§ III(A). FACTS ASSERTED CONCERNING PETITIONER BARHOUMI **BASED ON INFORMATION AND BELIEF**

12. Petitioner Barhoumi has been and continues to be detained in U.S. custody at the U.S. Naval Base at Guantánamo Bay.

13. Guantánamo Bay is a territory over which the United States exercises exclusive jurisdiction and control.

14. Upon information and belief, Petitioner Barhoumi desires to pursue in United States courts every available legal challenge to the lawfulness of his detention. Petitioner Barhoumi has been denied access to counsel by Respondents, accordingly, this and subsequent allegations of fact that pertain to Petitioner Barhoumi are based on information and belief.

15. Petitioner Barhoumi is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind under any definition adopted by the government in any civil or military proceeding.

16. Petitioner Barhoumi has never been engaged in any combat against the United States and was never part of any forces hostile to the United States.

17. Petitioner Barhoumi is not, nor has he ever been, an individual who was part of or supporting Taliban forces or partners.

18. Petitioner Barhoumi is not, nor has he ever been, an individual who was part of or supporting the al Qaeda organization or its partners (a/k/a al Qaida).

19. Petitioner Barhoumi has not committed a belligerent act nor directly supported hostilities in aid of enemy forces against the United States.

20. Petitioner Barhoumi has not caused or attempted to cause any harm to American personnel or property prior to his detention or espouse any violent act against any American person or property.

21. Petitioner Barhoumi has not engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

22. Petitioner Barhoumi has not knowingly harbored one or more individuals who is or were a member of the al Qaeda organization.

23. Petitioner Barhoumi has not knowingly harbored one or more individuals who were engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

24. Petitioner Barhoumi has not been afforded any procedures that would satisfy his rights under the most fundamental common law notions of due process, the U.S. Constitution, the laws and treaties of the United States, or customary international law.

25. Petitioner Barhoumi is not, nor has he ever been, an “enemy combatant” who was “part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2639 (June 28, 2004) (internal quotations omitted).

26. Petitioner Barhoumi is not, nor has he ever been, an “enemy combatant” as that term is used pursuant to the 7 July 2004 Order of Deputy Secretary of Defense Paul Wolfowitz, establishing the Combatant Status Review Tribunals.

27. Petitioner Barhoumi seeks to enforce his right to a judicial determination by an appropriate and lawful authority that there is a factual and legal basis for Respondents’ determination that he is either an “enemy combatant” as defined by the United States Supreme Court in *Hamdi* or an “enemy combatant” as that term is defined and used by the Executive in the Combatant Status Review Tribunals.

28. Petitioner Barhoumi is entitled to test the legality of his continued detention at Guantánamo Bay in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

29. There is no interest of the United States that is served by further detention of Petitioner Barhoumi at Guantánamo Bay.

§ III (B). THE JOINT RESOLUTION
("AUTHORIZATION FOR USE OF MILITARY FORCE")

30. In the wake of the September 11, 2001 attacks on the United States, the United States, at the direction of President Bush, began a military campaign against the Taliban government, then in power in Afghanistan.

31. On September 18, 2001, Congress passed and the President signed a joint resolution, the "Authorization for Use of Military Force" (the "AUMF"). The AUMF authorized the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.

Joint Resolution 23, Authorization for Use of Military Force, Public Law 107-40, 115 Stat. 224 (Sept. 18, 2001) ("Joint Resolution" a/k/a the "AUMF").

32. Prior to his detention at Guantánamo Bay, Petitioner Barhoumi did not plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

33. Prior to his detention at Guantánamo Bay, Petitioner Barhoumi did not belong to an organization that did plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

34. Prior to his detention at Guantánamo Bay, Petitioner Barhoumi did not harbor any organization or person who did plan, authorize, commit, or aid the terrorist attacks that occurred on September 11, 2001.

35. Petitioner Barhoumi is, therefore, not properly detained pursuant to President Bush's authority as Commander-in-Chief under the Joint Resolution.

§ III (C). MILITARY ORDER NO. 1.

36. On November 13, 2001, Respondent Bush issued Military Order No. 1. *See* Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) ("Military Order").

37. The Military Order authorizes Respondent Rumsfeld, *inter alia*, to detain indefinitely "any individual who is not a United States citizen with respect to whom [Respondent Bush] determine[s] from time to time in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
 - i. is or was a member of the organization known as al Qaida;
 - ii. has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
 - iii. has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
- (2) it is in the interest of the United States that such individual be subject to this order.

Military Order, §2(a).

38. The Military Order requires that “[Respondent Rumsfeld] shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3” Military Order, § 2(b).

39. The Military Order requires that “[a]ny individual subject to this order shall be ... (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria” Military Order, § 3(b).

40. The Military Order exceeds the Executive’s authority under Article II of the United States Constitution and is *ultra vires* and void on its face.

41. The Military Order was neither authorized nor directed by Congress, and is, therefore, beyond the scope of the Joint Resolution of September 18, 2001.

42. The Military Order purports to vest President Bush with the sole discretion to identify individuals who fall within its purview. *See id.*, § 2(a).

43. The Military Order establishes no standards governing the exercise of President Bush’s discretion to identify individuals who fall within its purview.

44. The Military Order contains no provision for an individual who has been detained to be notified of the charges he may face.

45. The Military Order contains no provision for an individual who has been detained to be notified of his rights under domestic and international law, and provides neither the right to counsel, nor the rights to notice of consular protection or to consular access at the detainee’s request.

46. The Military Order provides no right for an individual who has been detained to appear before a neutral tribunal to review the legality of a detainee’s continued detention, contains no provision for recourse to an Article III court, and,

moreover, expressly bars review by (i) any court of the United States, (ii) any court of any foreign nation, or (iii) any international tribunal. *See id.*, § 7(b)(2).

47. The Military Order authorizes detainees to be confined indefinitely without charges.

48. The Military Order authorizes indefinite and unreviewable detention, based on nothing more than the President Bush's written determination that an individual is subject to its terms.

49. The Military Order was promulgated in the United States and in this judicial district; the decision to detain Petitioner Barhoumi was made by Respondents in the United States and in this judicial district; the decision to detain Petitioner Barhoumi at Guantánamo was made in the United States and in this judicial district; and the decision to continue detaining Petitioner Barhoumi was, and continues to be, made by Respondents in the United States and in this judicial district.

50. Petitioner Barhoumi has not been, and is not being, detained lawfully either pursuant to the Military Order, President Bush's authority as Commander-in-Chief and/or under the laws and usages of war.

**§ III (D). PETITIONER BARHOUMI'S CONTINUED DETENTION
VIOLATES § 2(A) OF THE MILITARY ORDER**

51. To the extent the Military Order is not facially *ultra vires*, the detention of Petitioner Barhoumi continues in violation of the express provisions of the Military Order.

52. Petitioner Barhoumi is not properly subject to the Military Order. No writing otherwise required by the Military Order was issued as to Petitioner Barhoumi.

53. Petitioner Barhoumi has not been, and is not being, detained lawfully pursuant to the Military Order.

54. Petitioner Barhoumi is not, nor has he ever been, an individual who was a member of the organization known as al Qaeda.

55. Petitioner Barhoumi has not engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

56. Petitioner Barhoumi has not knowingly harbored one or more individuals who is or were a member of the al Qaeda organization.

57. Petitioner Barhoumi has not knowingly harbored one or more individuals who were engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threatened to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

58. There is no interest of the United States that is served by further detention of Petitioner Barhoumi at Guantánamo Bay.

59. Petitioner Barhoumi is entitled to test the legality of his continued detention under circumstances that violate Section 2(a) of the Military Order in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

**§ III (E). THE CONDITIONS OF DETENTION AT GUANTÁNAMO
VIOLATE § 3(B) OF THE MILITARY ORDER**

60. Upon information and belief, Petitioner Barhoumi is not being treated humanely as required by the Military Order, § 3(b).

61. On or about January 11, 2002, the United States military began transporting prisoners captured in Afghanistan to Camp X-Ray at the United States Naval Base in Guantánamo Bay, Cuba.

62. In April 2002, all prisoners at Guantánamo Bay were transferred to Camp Delta, a more permanent prison facility at Guantánamo Bay.

63. Certain prisoners at Guantánamo Bay are housed in Camp Delta and Camp Five, an additional maximum-security interrogation and detention center.

64. The United States military transferred Petitioner Barhoumi to Guantánamo Bay, where he has been held ever since, in the custody and control of Respondents.

65. Since gaining control of Petitioner Barhoumi, the United States military has held him virtually *incommunicado*.

66. Upon information and belief, Petitioner Barhoumi has been or will be forced to provide involuntary statements to Respondents' agents, employees, and/or contract employees at Guantánamo Bay.

67. Upon information and belief, Petitioner Barhoumi has been or will be interrogated repeatedly by agents of the United States Departments of Defense and Justice, and the Central Intelligence Agency, though he has not been charged with an offense and has not been notified of any pending or contemplated charges.

68. Upon information and belief, Petitioner Barhoumi has not appeared before a lawful military or civilian tribunal, and has not been provided access to counsel or the means to contact and secure counsel.

69. Upon information and belief, Petitioner Barhoumi has not been adequately informed of his rights under the United States Constitution, the regulations of the United States Military, the Geneva Conventions, the International Covenant on Civil and Political Rights, the American Declaration on the Rights and Duties of Man, the 1954 Convention Relating to the Status of Refugees or customary international law. Indeed, Respondents have taken the position that Petitioner Barhoumi should not be informed of these rights. As a result, Petitioner Barhoumi lacks any ability to protect or to vindicate his rights under domestic and international law.

70. Upon information and belief, Petitioner Barhoumi has been treated inhumanely and held under conditions that violate his constitutional and international rights to dignity and freedom from torture and from cruel, inhumane and degrading treatment or punishment. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 83-115, Ch.12-13, AMR 51/063/2005 (13 May 2005);
- (b) Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by US Forces," Ch.3 (2005)
- (c) United Nations, Press Release, "United Nations Human Rights Experts Express Continued Concern About Situation of Guantánamo Bay Detainees," Feb. 4, 2005;
- (d) International Committee of the Red Cross, Press Release, "The ICRC's Work at Guantánamo Bay," Nov. 30, 2004;
- (e) International Committee of the Red Cross, Operational Update, "US Detention Related to the Events of September 11, 2001 and Its Aftermath - the Role of the ICRC," July 26, 2004;

- (f) Amnesty International, *United States of America: Human Dignity Denied: Torture and Accountability in the 'War on Terror'*, at 22 (Oct. 27, 2004)(available at <http://web.amnesty.org/library/Index/ENGAMR.511452004>); *see also*
- (g) Barry C. Scheck, *Abuse of Detainees at Guantánamo Bay*, The Nat'l Assoc. of Criminal Defense Lawyers' Champion, Nov. 2004, at 4-5.

71. Many of the violations reported in the sources in the preceding paragraph – which include isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror – were interrogation techniques approved for use at Guantánamo by the most senior Department of Defense lawyer. *See, e.g.:*

- (a) Action Memo from William J. Haynes II, General Counsel, DOD, to Secretary of Defense (Nov. 27, 2002);
- (b) *Pentagon Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations*, at 62-65 (Apr. 4, 2003).²

72. In a confidential report to the United States government, the ICRC charged the U.S. military with intentional use of psychological and physical coercion on prisoners at Guantánamo Bay during interrogations that is “tantamount to torture.” *See, e.g.:*

² Additional details of the cruel and degrading conditions suffered by detainees at Guantánamo Bay are set out at length in a statement by numerous released British detainees. *See* Shafiq Rasul, Asif Iqbal & Rhuhel Ahmed, *Composite Statement: Detention in Afghanistan and Guantánamo Bay*, 300, at <http://www.ccr-ny.org/v2/reports/docs/Gitmo-compositestatementFINAL23july04.pdf>. The Department of Defense also informed the Associated Press that a number of interrogators at Guantánamo Bay have been demoted or reprimanded after investigations into accusations of abuse at the facility. *See Report Details Guantánamo Abuses*, Assoc. Press, Nov. 4, 2004.

- (a) Neil A. Lewis, "Red Cross Finds Detainee Abuse in Guantánamo," *New York Times*, Nov. 30, 2004, at A1 (including claims that doctors and other medical workers at Guantánamo Bay participated in planning for interrogations); *see also*
- (b) M. Gregg Bloche and Jonathan H. Marks, "When Doctors Go to War," *New England Journal of Medicine*, Jan. 6, 2005, at 3-4.

73. Since details of the ICRC's report emerged, new revelations of abuse and torture at Guantánamo Bay have appeared, including FBI memos detailing torture and "highly aggressive interrogation techniques" including 24-plus hour interrogations involving temperature extremes, dogs, prolonged isolation, and loud music. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 83-115, Ch.12-13, AMR 51/063/2005 (13 May 2005);
- (b) Amnesty International, "Guantánamo: An Icon of Lawlessness," Jan. 6, 2005, at 3-5; *see also*
- (c) Physicians for Human Rights, "Break Them Down: Systematic Use of Psychological Torture by US Forces," Ch.3 (2005);
- (d) Neil A. Lewis, "Fresh Details Emerge on Harsh Methods at Guantánamo," *New York Times*, Jan. 1, 2005, at A11;
- (e) Carol D. Leonnig, "Further Detainee Abuse Alleged; Guantánamo Prison Cited in FBI Memos," *Washington Post*, Dec. 26, 2004, at A1;
- (f) Neil A. Lewis and David Johnston, "New F.B.I. Memos Describe Abuses of Iraq Inmates," *New York Times*, Dec. 21, 2004, at A1;
- (g) Dan Eggen and R. Jeffrey Smith, "FBI Agents Allege Abuse of Detainees at Guantánamo Bay," *Washington Post*, Dec. 21, 2004, at A1;
- (h) Neil A. Lewis, "F.B.I. Memos Criticized Practices at Guantánamo," *New York Times*, Dec. 7, 2004, at A19.

74. Even more recently, the Associated Press has reported allegations that female Guantánamo interrogators have used sexual taunting, including smearing fake menstrual blood on a detainee's face, to try to break Muslim detainees. *See, e.g.:*

- (a) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 89-90, Ch.12, AMR 51/063/2005 (13 May 2005);
- (b) Associated Press, *Gitmo Soldier Details Sexual Tactics*, Jan. 27, 2005;

75. The unlawful and unconstitutional interrogation techniques used by Respondents at Guantánamo include not only physical and psychological abuse, but also other impermissible conduct contrary to due process requirements, including, upon information and belief, having agents of the Government present themselves as lawyers for the detainees during meetings with the detainees, for the purpose of extracting information from the detainees. *See, e.g.*: Sam Hannel, "Lawyers Describe Guantánamo Detainees," *Seattle Post-Intelligencer*, Jan. 19, 2005.

76. Respondents, acting individually or through their agents, have stated that whatever limitations apply on coercive interrogation techniques used by U.S. military officials under the auspices of the Department of Defense *do not apply* to interrogations conducted by agents of the CIA or other entities under President Bush. *See, e.g.*:

- (a) Eric Lichtblau, "Gonzales Says '02 Policy on Detainees Doesn't Bind CIA," *New York Times*, Jan. 19, 2005, at A17;
- (b) Dan Eggen and Charles Babington, "Torture by U.S. Personnel Illegal, Gonzales Tells Senate," *Washington Post*, Jan. 18, 2005, at A4; and
- (c) Amnesty International, "Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power," at 27-43, Ch.5, AMR 51/063/2005 (13 May 2005).

77. In published statements, President Bush and Secretary Rumsfeld, and predecessors of Hood and Bumgarner, respectively, Brigadier General Michael Lenhert and Army Colonel Terry Carrico, have proclaimed that the United States may hold the detainees under their current conditions indefinitely. *See, e.g.*,

- (a) Roland Watson, *The Times* (London), Jan. 18, 2002 (“Donald Rumsfeld, the U.S. Defense Secretary, suggested last night that Al-Qaeda prisoners could be held indefinitely at the base. He said that the detention of some would be open-ended as the United States tried to build a case against them.”);
- (b) Lynne Sladky, Assoc. Press, Jan. 22, 2002 (“Marine Brig. Gen. Mike Lehnert, who is in charge of the detention mission, defended the temporary cells where detainees are being held ‘We have to look at Camp X-ray as a work in progress ...’ Lehnert told CNN. Lehnert said plans are to build a more permanent prison ‘exactly in accordance with federal prison standards’”);
- (c) John Mintz, “Extended Detention in Cuba Mulled,” *The Washington Post*, February 13, 2002 (“As the Bush Administration nears completion of new rules for conducting military trials of foreign detainees, U.S. officials say they envision the naval base at Guantánamo Bay, Cuba, as a site for the tribunals and as a terrorist penal colony for many years to come.”).

78. According to the Department of Defense, even detainees who are adjudged not guilty of all charges by a military commission may nevertheless be kept in detention at Guantánamo Bay indefinitely. *See* Department of Defense Press Background Briefing of July 3, 2003, at <http://www.defenselink.mil/transcripts/2003/tr20030703-0323.html> (last visited Jun. 4, 2005).

79. Counsel for Respondents have also consistently maintained that the United States has reserved the right to hold the detained Petitioners under their current conditions indefinitely. *See, e.g.:*

- (a) *In re Guantánamo Detainee Cases*, Nos. 02-CV-0299 (CKK), *et al.*, (D.D.C.), Tr. of Dec. 1, 2004 Or. Argument on Mot. to Dismiss at 22-24, statements of Principle Deputy Associate Att’y Gen. Brian Boyle; *see also*
- (b) Dana Priest, “Long-Term Plan Sought for Terror Suspects,” *Wash. Post*, Jan. 2, 2005, at A1.

80. Moreover, the Government has recently acknowledged plans to begin constructing a new, more permanent facility at Guantánamo Bay. *See, e.g.:*

- (a) Christopher Cooper, "In Guantánamo, Prisoners Languish in a Sea of Red Tape," *Wall Street Journal*, Jan. 26, 2005, at A1;
- (b) Associated Press, "Guantánamo Takes on the Look of Permanency," Jan. 9, 2005.

81. Petitioner Barhoumi is entitled to test the legality of his continued detention under circumstances that violate Section 3(b) of the Military Order in the federal courts. *Rasul v. Bush*, 124 S.Ct. 2686, 2698 (2004).

82. These and other acts violate the first clause of Section 3(b) of the Military Order. Petitioner Barhoumi has suffered discriminatory treatment in violation of the second clause of Section 3(b) of the Military Order. This discriminatory and illegal treatment resulted from abuse of the Koran by agents of Respondents and other inhumane treatment aimed at the religious beliefs of Petitioner Barhoumi. *See, e.g.*:

- (a) Statement by Pentagon Spokesman Mr. Lawrence Di Rita on BG Hood Inquiry, No. 557-05, June 3, 2005;
- (b) U.S. Southern Command Press Release, "Hood Completes Koran Inquiry," June 3, 2005;
- (c) Carol Leonnig and Dana Priest, "Detainees Accuse Female Interrogators," *Washington Post*, at A01, Feb. 10, 2005.

83. Petitioner Barhoumi has otherwise suffered discriminatory inhumane treatment based on his country or origin, nationality, and religion. Respondents have released nearly 100 percent of detainees who were citizens of Australia or most European countries, regardless of their circumstances of capture or alleged terrorists activities. *See, e.g.*, Department of Defense Press Release, dated March 7 and 12, 2005 (Nos. 236-05 and 249-05). Only a small fraction of detainees from other regions of the world have been released. No Algerians are believed to have been released. *See id.* This discriminatory treatment violates the second clause of Military Order Section 3(b) and further constitutes inhumane treatment in violation of that order.

**§ III (F). RENDITION OF PRISONERS OR THE THREAT THEREOF
VIOLATES THE MILITARY ORDER AND IS *ULTRA VIRES* AND UNLAWFUL**

84. Upon information and belief, Petitioner Barhoumi is subject to extraordinary rendition to a government who condones torture or the threat thereof.

85. During interrogations, detainees have been threatened with rendition or transfer to countries that routinely practice torture. Upon information and belief, the United States has secretly transferred detainees to such countries without complying with the applicable legal requirements for extradition. This practice, known as “rendition” or “extraordinary rendition,” is used to facilitate interrogation by subjecting detainees to torture. *See e.g.:*

- (a) Amnesty International, “Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power,” at 130-36, Ch.15, AMR 51/063/2005 (13 May 2005); and
- (b) Jane Mayer, “Outsourcing Torture: The Secret History of American’s “Extraordinary Rendition” Program, *The New Yorker*, Feb. 14, 2005, at 106.

86. The U.S. government’s practice of rendition has been well documented by various major American and international news organizations, including, *inter alia*, the *Washington Post*, *The Los Angeles Times*, and the British Broadcasting Corporation (the “BBC”). According to new accounts,

Since September 11, the U.S. government has secretly transported dozens of people suspected of links to terrorists to countries other than the United States bypassing extradition procedures and legal formalities, according to Western diplomats and intelligence source. The suspects have been taken to countries, . . . whose intelligence services have close ties to the CIA and where they can be subjected to interrogation tactics – including torture and threats to families – that are illegal in the United States, the sources said. In some cases, U.S. intelligence agents remain closely involved in the interrogations, the sources said.

Rajiv Chanrasekaran & Peter Finn, “U.S. Behind Secret Transfer of Terror Suspects,” *Wash. Post*, March 11, 2002, at A1; *see also* Dana Priest, “Long Term Plan Sought for Terror Suspects,” *Wash. Post*, Jan 2, 2005, at A1 (“The transfers, called ‘renditions,’ depend on arrangements between the United States and other countries, such as Egypt . . . , and agree to have local security services hold certain suspects in their facilities for interrogation by CIA and foreign liaison officers.”);

87. The Military Order does not grant authority to the Secretary of Defense or any other agent of Respondents to render any individual subject to the Military Order to a foreign government for any purpose whatsoever. Actual rendition, therefore, is *ultra vires* and illegal. Further, rendition of persons subject to the Military Order or the threat thereof violates Section 3(b) of the Military Order and is illegal.

88. Rendition of individuals subject to the Military Order exceeds the Executive’s authority under Article II of the United States Constitution and is *ultra vires* and unlawful.

§ III (G). THE CONDITIONS OF DETENTION AT GUANTÁNAMO, INCLUDING THE THREAT OF RENDITION, VIOLATE H.R. 1268.

89. Recently passed H.R. 1268, “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,” Public Law No: 109-13, includes Section 1031, entitled: “Prohibition on Torture and Cruel, Inhuman, or Degrading Treatment.”

90. Section 1031 of H.R. 1268, provides:

- (a)(1) None of the funds appropriated or otherwise made available by this Act shall be obligated or expended to subject any person in the custody or under the physical control of the United States to torture or cruel, inhuman, or degrading treatment or punishment that is

prohibited by the Constitution, laws, or treaties of the United States.

- (2) Nothing in this section shall affect the status of any person under the Geneva Conventions or whether any person is entitled to the protections of the Geneva Conventions.

(b) As used in this section –

- (1) the term ‘torture’ has the meaning given that term in section 2340(1) of title 18, United States Code; and
- (2) the term ‘cruel, inhuman, or degrading treatment or punishment’ means the cruel, unusual, and inhumane treatment or punishment prohibited by the fifth amendment, eighth amendment, or fourteenth amendment to the Constitution of the United States.

91. Sections 2340(1)-(3) of Title 18, United States Code, provides:

As used in this chapter –

- (1) "torture" means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) "severe mental pain or suffering" means the prolonged mental harm caused by or resulting from -
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering; the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (B) the threat of imminent death; or
 - (C) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and
- (3) "United States" includes all areas under the jurisdiction of the United States including any of the places described in sections 5 and 7 of this title and section 46501(2) of title 49.

92. As set forth above, upon information and belief, detainees have been and continue to be treated inhumanely and held under conditions that violate their constitutional and international rights to dignity and freedom from torture and from cruel, inhumane and degrading treatment or punishment, all of which occur in violation of Section 1031.

93. As set forth above, upon information or belief, detainees have endured or continue to endure or be threatened with isolation for up to 30 days, 28-hour interrogations, extreme and prolonged stress positions, sleep deprivation, sensory assaults, removal of clothing, hooding, and the use of dogs to create anxiety and terror, each of were interrogation techniques approved for use at Guantánamo Bay by the most senior Department of Defense lawyer, and all of which occur in violation of Section 1031.

94. As set forth above, upon information or belief, detainees have been or are subject to or are threatened with psychological and physical coercion during interrogations that is “tantamount to torture,” all of which occur in violation of Section 1031.

95. As set forth above, upon information or belief, detainees have been, continue to be or are threatened with “highly aggressive interrogation techniques” including 24-plus hour interrogations involving temperature extremes, dogs, prolonged isolation, and loud music, all of which occur in violation of Section 1031.

96. As set forth above, upon information or belief, detainees have been, continue to be or are threatened with sexual taunting, including smearing fake menstrual blood on a detainee’s face, all of which occur in violation of Section 1031.

97. As set forth above, upon information or belief, during interrogations, detainees have been threatened with rendition or transfer to countries that routinely practice torture and, moreover, the United States has secretly transferred detainees to such countries without complying with the applicable legal requirements for extradition, which occurs in violation of Section 1031.

98. The foregoing occurrences amount to torture, as that term is defined in 18 U.S.C. § 2340(1), including the intentional infliction of severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon detainees.

99. The foregoing occurrences amount to cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution, laws, or treaties of the United States.

100. The foregoing occurrences amount to violations of Section 1031, thereby entitling Petitioner Barhoumi to injunctive relief, including an injunction from this Court enjoining Respondents from further obligating or expending funds appropriated under HR 1268 for the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay.

§ III (H). The Military Commission.

101. After more than a year and a half of confinement and interrogation, on July 6, 2004, Respondent President Bush designated Barhoumi as a person eligible for trial before the Commission. The Commission was established by Presidential Military Order, dated November 13, 2001, *see* 66 Fed. Reg. 57,833 (November 13, 2001) (hereinafter "PMO"), and the March 21, 2002, Military Commission Order No. 1 (hereinafter "MCO No. 1").

102. On November 4, 2005, Barhoumi was formally charged with conspiracy. A true and correct copy of the charge is attached hereto as Exhibit ____.

103. On December 5, 2005, Capt. Wade N. Faulkner, JA, USA, was formally detailed to serve as Barhoumi's military defense counsel. Capt. Faulkner is scheduled to travel to Guantanamo Bay on or about December 13, 2005 to meet with Barhoumi. On information and belief, this will constitute the first time which Mr. Barhoumi will have the opportunity to receive advice of counsel in all the years of his confinement.

104. Some of the procedures for the military commissions under which Barhoumi will be tried were set up in the MCO No. 1. Many other procedures will be made up as the proceedings go along, precluding the accused from having anywhere close to a full understanding of the procedures under which he will be tried. One such example, evident from the nascent proceedings that have occurred thus far in the Commission process, is that a member of the Commission can be challenged "for good cause" – but what constitutes good cause is not defined under Commission rules. Nor are the standards by which "good cause" is evaluated articulated in the Commission rules. The Presiding Officer acknowledged that gap, and declined to define "good cause" conclusively, instead directing counsel to brief this issue for the Appointing Authority.

105. Even those procedures that have been clearly established are deficient and will not result in a full and fair trial. Under these existing procedures, Respondent Secretary Rumsfeld has appointed an Appointing Authority, Respondent Altenburg, a retired Army officer who is currently employed by the Department of Defense in a civilian capacity. The Appointing Authority will in turn appoint members of the

Commission who will decide questions of both law and fact. *Id.* at ¶ 4. Only the presiding officer will be required to have any legal experience. The defendant will have no peremptory challenges with respect to members of the Commissions. Thus, Respondent Secretary Rumsfeld and his appointee, who are investigating and prosecuting Barhoumi, will ultimately be responsible for choosing the panel that will judge him. *Id.* at ¶ 6.

106. During the military commission proceedings, there is no bar to admission of evidence that courts normally deem unreliable -- such as statements coerced from Barhoumi at a time when he had no counsel, or statements coerced from other detainees. Indeed, witness statements can be used even if the witnesses are not available to testify and their testimony is presented as unsworn hearsay.

107. There will be no direct appeal from a decision of the Commission. *Id.* The proceedings will be reviewed, but not in federal court. The first review will be conducted by the Appointing Authority (who appointed the Commission members, brought the charges and decided any interlocutory legal issues). *Id.* The second review will be by a panel consisting of four members already appointed by the Respondent Secretary of Defense, including two members who were on the very panel that crafted the trial procedures, *id.*, another member who has written an op-ed piece stating that, "[i]t is clear that the September 11 terrorists and detainees, whether apprehended in the United States or abroad, are protected neither under our criminal-justice system nor under the international law of War," and a fourth member who is a close friend of

Respondent Secretary Rumsfeld.⁴ Subsequent review will be by the Secretary of Defense and/or the President. *Id.* Barhoumi's accusers will thus be the "appellate court." Thus, not only has Barhoumi been held without trial for 32 months but there is no future prospect of a trial by an impartial tribunal using only reliable evidence. Moreover, even if the initial factfinder were to overcome its bias and find Barhoumi not guilty, this would not guarantee an acquittal. At any stage in the review process, the reviewers can send the case back for further proceedings -- perhaps even after a finding of not guilty.

108. Just as there has not been and will not be an unbiased determination that Barhoumi is guilty of any crimes, there also has been no determination by a neutral tribunal that Barhoumi can justifiably be held as an enemy combatant. On June 28, 2004, the United States Supreme Court decided *Hamdi*, 542 U.S. at ___, 124 S. Ct. 2633 (2004), in which it determined that individuals could not be detained as enemy combatants unless such a determination was made by a neutral tribunal that accorded them due process.

109. Subsequently, the United States created a Combatant Status Review Tribunal ("CSRT") to make determinations as to whether those held were enemy combatants. The CSRT was hastily formed in the wake of the Supreme Court's decisions in *Rasul* and *Hamdi*, and does not qualify as the neutral tribunals that satisfies

⁴ Stephen J. Fortunato, Jr., *A Court of Cronies*, In These Times (Jun. 28, 2004) available at http://www.inthesetimes.com/site/main/article/a_court_of_cronies.

the requirements of due process. For example, the CSRT fails even to meet the standards for Article 5 hearings as set forth in U.S. Army regulations.⁵

110. The CSRT varies from both the Army regulations and *Hamdi* (and due process generally) materially and dispositively, including with respect to, *inter alia*: (1) the standard of proof required [Regulation 190-8, §1-6(e)(9)'s preponderance of the evidence standard as opposed to the CSRT's "rebuttable presumption" that the detainee is an enemy combatant]⁶; (2) the availability of an appeal by the government of a ruling favorable to the detainee; (3) the categories in which a detainee may be placed (*i.e.*, the CSRT fails to allow for POW status, but instead purport to determine only whether or not a detainee is an "enemy combatant"); (4) the detainee's right to counsel and/or representation by a personal representative of choice before the Tribunal; (5) whether the hearings are open to the public; (6) the government's reserved power to rescind or change the conditions of the Tribunals at its whim; (7) the composition of the Tribunal(s) (in contrast with *Hamdi's* requirement of "neutral decisionmaker[s,]" 542 U.S. at ___, 124 S. Ct. at 2648); and (8) even the definition of "enemy combatant." These deficiencies are individually and collectively fatal to the CSRT.

111. Moreover, there has been no CSRT determination for Barhoumi, and any CSRT or Commission proceeding that would now occur would inherently be

⁵ See Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, §1-6 (1997).

⁶ Indeed, the Order implementing the Combatant Status Review Tribunals informs tribunal members that the detainee's status has already been predetermined by their superiors: "[e]ach detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." See Dep't of Defense Order No. 651-04, (July 07, 2004), *available at* <http://www.defenselink.mil/releases/2004/nr20040707-0992.html> (attached hereto as Exhibit 8).

prejudicial. Barhoumi has now been held for several years without a determination by a neutral tribunal that he is an enemy combatant or a trial to determine whether he has committed war crimes. This delay has greatly prejudiced the likely result of any proceeding that would now occur.

112. On information and belief, the government has relied upon and intends to use at trial, statements by persons who were detainees at Guantanamo Bay, but who have since been released.

113. Thus, the prejudice Barhoumi has suffered as a result of the denial of his rights to a speedy trial have been multifaceted:

- (a) he was denied access to counsel for several years, during which time he was interrogated under coercive and illegal conditions;
- (b) on information and belief, persons whose statements against Barhoumi may be introduced by the government at the Commission trial are no longer at Guantanamo Bay, and therefore, are no longer accessible as witnesses. As a result, not only will the government attempt to admit such statements in evidence without providing Barhoumi any opportunity for cross-examination, but those persons will not be available to be called as witnesses. Moreover, with respect to other former detainees whom the government does not intend to call (or to introduce statements from), but whom Barhoumi would call as witnesses, the inordinate delay in providing Barhoumi an appropriate hearing has rendered them unavailable as well.

114. Consequently, as a result of the denial of Barhoumi's speedy trial rights, he will be deprived of the rights to confront the evidence against him, and to present his defense at Commission proceedings. The absence of a speedy trial is another ground for Barhoumi's release.

SECTION IV
CAUSES OF ACTION

FIRST CLAIM FOR RELIEF
(COMMON LAW DUE PROCESS AND DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE MILITARY ORDER: UNLAWFUL DEPRIVATION OF LIBERTY AND INHUMANE TREATMENT)

115. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

116. By the actions described above, Respondents, acting under color of law, have violated and continue to violate common law principles of due process as well as the Due Process Clause of the Fifth Amendment to the Constitution of the United States. President Bush has ordered the prolonged, indefinite, and arbitrary detention of individuals, without due process of law, and the remaining Respondents have implemented those orders. Respondents' actions deny Petitioner Barhoumi the process accorded to persons seized and detained by the United States military in times of armed conflict as established by, *inter alia*, the Uniform Code of Military Justice, Army Regulation 190 - 8, Articles 3 and 5 of the Third and Fourth Geneva Conventions, and customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

117. To the extent that Petitioner Barhoumi's detention purports to be authorized by the Military Order, that Order violates the Fifth Amendment on its face and as applied to Petitioner.

118. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

119. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SECOND CLAIM FOR RELIEF
**(DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES:
UNLAWFUL CONDITIONS OF CONFINEMENT)**

120. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

121. By the actions described above, Respondents, acting under color of law, have violated and continue to violate the right of Petitioner Barhoumi to be free from unlawful conditions of confinement, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

122. Accordingly, Petitioner Barhoumi is entitled to declaratory and injunctive relief as well as any other relief the court may deem appropriate.

THIRD CLAIM FOR RELIEF
**(GENEVA CONVENTIONS AND THE MILITARY ORDER:
ARBITRARY DENIAL OF DUE PROCESS AND INHUMANE TREATMENT)**

123. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

124. By the actions described above, Respondents, acting under color of law, have denied and continue to deny Petitioner Barhoumi the process accorded to persons seized and detained by the United States military in times of armed conflict as established by specific provisions of the Third and Fourth Geneva Conventions.

125. Violations of the Geneva Conventions are direct treaty violations, are violations of customary international law, and constitute an enforceable claim under 28 U.S.C. § 2241 (c)(3).

126. Respondents are liable for this conduct described above, insofar as they set the conditions, directly and/or indirectly facilitated, ordered, acquiesced, confirmed, ratified, and/or conspired to violate the Geneva Conventions.

127. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

128. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FOURTH CLAIM FOR RELIEF
(INTERNATIONAL HUMANITARIAN AND HUMAN RIGHTS LAW
AND THE MILITARY ORDER:
ARBITRARY DENIAL OF DUE PROCESS AND INHUMANE TREATMENT)

129. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

130. By the actions described above, Respondents have denied and continue to deny Petitioner Barhoumi the due process accorded to persons seized and detained by the United States military in times of armed conflict as establish by customary international humanitarian and human rights law as reflected, expressed, and defined in multilateral treaties and other international instruments and domestic judicial decisions, and other authorities.

131. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

132. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FIFTH CLAIM FOR RELIEF
**(ALIEN TORT STATUTE AND THE MILITARY ORDER:
TORTURE (INHUMANE TREATMENT))**

133. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

134. By the actions described above, the Respondents directed, ordered, confirmed, ratified, and/or conspired to bring about acts that deliberately and intentionally inflicted severe physical and/or psychological abuse and/or agony upon Petitioner Barhoumi in order to obtain coerced information or confessions from him, punish or intimidate Petitioner Barhoumi or for other purposes. Among other abuses, Petitioner Barhoumi has been held in conditions of isolation; placed in constant vulnerability to repeated interrogation and severe beatings; kept in cages with no privacy; shackled with heavy chains and irons; placed in solitary confinement for minor rule infractions for prolonged periods of time; interrogated while shackled and chained in painful positions; exposed to extremes of temperature; subjected to violent behavior or the threat of violence; threatened with rendition to countries that practice torture; sexually humiliated; denied access to counsel and family; deprived of adequate medical care; and/or subjected to repeated psychological abuse.

135. The acts described herein constitute torture in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. §1350, in that the acts violated customary international law prohibiting torture as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

136. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

137. Respondents are liable for said conduct because they directed, ordered, confirmed, ratified, and/or conspired together and with others to commit the acts of torture against Petitioner Barhoumi.

138. Petitioner Barhoumi was forced to suffer severe physical and/or psychological abuse and agony and is therefore entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

SIXTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
WAR CRIMES (INHUMANE TREATMENT))

139. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

140. By the actions described above, Respondents' acts directing, ordering, confirming, ratifying, and/or conspiring to bring about the torture and other inhumane treatment of Petitioner Barhoumi constitute war crimes and/or crimes against humanity in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated, among others, the Fourth Geneva Convention, Common Article III of

the Geneva Conventions and Additional Protocols I and II of the Geneva Conventions as well as customary international law prohibiting war crimes as reflected, expressed, and defined in other multilateral treaties and international instruments, international and domestic judicial decision, and other authorities.

141. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

142. As a result of Respondents' unlawful conduct, Petitioner Barhoumi has been and is forced to suffer severe physical and/or psychological abuse and agony, and is therefore entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

SEVENTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
CRUEL, INHUMANE OR DEGRADING TREATMENT)

143. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

144. The acts described herein had the intent and the effect of grossly humiliating and debasing Petitioner Barhoumi, forcing him to act against his will and conscience, inciting fear and anguish, and breaking his physical or moral resistance.

145. The acts described herein constitute cruel, inhumane or degrading treatment in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting cruel, inhumane or degrading treatment as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

146. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

147. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to cause the cruel, inhumane or degrading treatment of Petitioner Barhoumi.

148. Petitioner Barhoumi was forced to suffer severe physical and/or psychological abuse and agony and is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as other relief to be determined at trial.

EIGHTH CLAIM FOR RELIEF
**(ALIEN TORT STATUTE AND THE MILITARY ORDER:
ARBITRARY ARREST AND PROLONGED ARBITRARY DETENTION
(INHUMANE TREATMENT))**

149. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

150. The acts described herein constitute arbitrary arrest and detention of Petitioner Barhoumi in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

151. Respondents are liable for said conduct in that they directed, ordered, confirmed, ratified, and/or conspired together and with others to bring about the arbitrary arrest and prolonged arbitrary detention of Petitioner Barhoumi in violation of

the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting arbitrary arrest and prolonged arbitrary detention as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

152. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

153. As a result of Respondents' unlawful conduct, Petitioner Barhoumi has been and is deprived of his freedom, separated from his family, and forced to suffer severe physical and mental abuse, and is therefore entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, and such other relief as the court may deem appropriate.

NINTH CLAIM FOR RELIEF
**(ALIEN TORT STATUTE AND THE MILITARY ORDER:
ENFORCED DISAPPEARANCE (INHUMANE TREATMENT))**

154. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

155. By the actions described above, the Respondents directed, ordered, confirmed, ratified, and/or conspired to bring about the enforced disappearance of Petitioner Barhoumi in violation of the law of nations under the Alien Tort Statute, 28 U.S.C. § 1350, in that the acts violated customary international law prohibiting enforced disappearances as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

156. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

157. As a result of Respondents' unlawful conduct, Petitioner Barhoumi has been and is deprived of his freedom, separated from his family, and forced to suffer severe physical and mental abuse, and is therefore entitled to necessarily related declaratory and injunctive relief and such other relief as the court may deem appropriate.

TENTH CLAIM FOR RELIEF
(ARTICLE II OF THE UNITED STATES CONSTITUTION:
UNLAWFUL DETENTION)

158. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

159. Petitioner Barhoumi is not, nor has he ever been, an enemy alien, lawful or unlawful belligerent, or combatant of any kind. The Executive lacks the authority to order or direct military officials to detain civilians who are seized far from the theater of war or occupied territory or who were not "carrying a weapon against American troops on a foreign battlefield." *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2642 n.1 (2004).

160. By the actions described above, President Bush has exceeded and continues to exceed the Executive's authority under Article II of the United States Constitution by authorizing, ordering and directing that military officials seize Petitioner Barhoumi and transfer him to military detention, and by authorizing and ordering their continued military detention at Guantánamo Bay. All of the Respondents acted and continue to act without lawful authority by directing, ordering, and/or supervising the seizure and military detention of Petitioner Barhoumi.

161. The military seizure and detention of Petitioner Barhoumi by the Respondents is *ultra vires* and illegal because it violates Article II of the United States Constitution. To the extent that the Executive asserts that Petitioner's detention is authorized by the Military Order, that Order exceeds the Executive's authority under Article II and is *ultra vires* and void on its face and as applied to Petitioner.

162. To the extent that Respondents assert that their authority to detain Petitioner Barhoumi derives from a source other than the Military Order, including without limitation the Executive's inherent authority to conduct foreign affairs or to serve as Commander-in-Chief of the U.S. Armed Forces, whether from Article II of the Constitution or otherwise, Respondents lack that authority as a matter of fact and law.

163. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

ELEVENTH CLAIM FOR RELIEF
(VIOLATION OF THE APA AND THE MILITARY ORDER:
ARBITRARY AND CAPRICIOUS UNLAWFUL DETENTION (INHUMANE TREATMENT))

164. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

165. Army Regulation 190 - 8 prohibits the detention of civilians who were seized away from the field of battle or outside occupied territory or who were not engaged in combat against the United States. *See, e.g.*, Army Regulation. 190-8 at 1-6(g) ("Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without

further proceedings to determine what acts they have committed and what penalty should be imposed.”).

166. By arbitrarily and capriciously detaining Petitioner Barhoumi in military custody for upwards of three years in the manner described above, Respondents have acted and continue to act *ultra vires* and unlawfully in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2).

167. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

168. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus, and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

TWELFTH CLAIM FOR RELIEF
(VIOLATION OF THE APA AND THE MILITARY ORDER:
ARBITRARY AND CAPRICIOUS DENIAL OF DUE PROCESS (INHUMANE TREATMENT))

169. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

170. By the actions described above, Respondents, acting under color of law, have arbitrarily and capriciously denied and continue to deny Petitioner Barhoumi the process accorded to persons seized and detained by the United States military in times of armed conflict as established by Army Regulation 190-8 in violation of the Administrative Procedures Act, 5 U.S.C. §706(2).

171. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

172. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

THIRTEENTH CLAIM FOR RELIEF
**(VIOLATION OF THE APA AND THE MILITARY ORDER:
TORTURE AND CRUEL, INHUMANE OR DEGRADING TREATMENT)**

173. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

174. By the actions described above, the Respondents have acted and continue to act arbitrarily and capriciously by directing, ordering, confirming, ratifying, and/or conspiring to unlawfully subject Petitioner Barhoumi to torture and/or cruel, inhumane or degrading treatment in violation of Army Regulation 190-8 and the Administrative Procedures Act, 5 U.S.C. § 706(2).

175. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

176. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FOURTEENTH CLAIM FOR RELIEF
(VIOLATION OF THE RIGHT TO COUNSEL AND ACCESS TO THE COURTS)

177. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

178. Respondents, purportedly acting from a concern for national security, consistently have contrived to intrude upon Petitioner Barhoumi's right to consult with

counsel by conditioning counsel's access to Petitioner on unreasonable terms, including classification/declassification procedures, all in violation of Petitioner Barhoumi's attorney-client privilege, his work product privilege, and the Fifth and Sixth Amendments to the U.S. Constitution.

179. Accordingly, Petitioner Barhoumi is entitled to a writ of habeas corpus and to necessarily related declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

FIFTEENTH CLAIM FOR RELIEF
**(DUE PROCESS CLAUSE AND THE MILITARY ORDER:
RENDITION OR THE THREAT THEREOF (INHUMANE TREATMENT))**

180. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

181. Upon information and belief, Petitioner Barhoumi is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture and being threatened with same. The transfer of the Petitioner (or threat of same) to a country where there is a foreseeable and direct risk that he will be subjected to torture constitutes a violation of Petitioner's rights under the Due Process Clause of the Fifth Amendment to the United States Constitution.

182. These unlawful acts of Respondents violate the Military Order, as they constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

183. Accordingly, Petitioner Barhoumi is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SIXTEENTH CLAIM FOR RELIEF
(CONVENTION AGAINST TORTURE AND
CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE MILITARY ORDER:
RENDITION (INHUMANE TREATMENT))

184. Petitioners incorporate by reference all preceding paragraphs as set forth fully herein.

185. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of the Petitioner to a country that creates a foreseeable and direct risk that he will be subjected to torture constitutes a direct violation of Petitioner's rights under the Convention Against Torture and the 1954 Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 150 *entered into force* Apr. 22, 1954.

186. Such rendition would violate the Military Order, as it would constitute illegal and inhumane treatment in violation of Section 3(b) of that order and would otherwise be illegal and *ultra vires*.

187. Accordingly, Petitioner Barhoumi is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

SEVENTEENTH CLAIM FOR RELIEF
(ALIEN TORT STATUTE AND THE MILITARY ORDER:
RENDITION (INHUMANE TREATMENT))

188. Petitioners incorporate by reference all preceding paragraphs as if set forth fully herein.

189. Upon information and belief, Petitioner is at risk of being rendered, expelled or returned without lawful procedures to a country that engages in torture. The transfer of the Petitioner to a country that creates a foreseeable and direct risk that

he will be subjected to torture constitutes a violation of Petitioner's rights under customary international law, which may be vindicated under the Alien Tort Statute.

190. Such unlawful acts of Respondents would violate the Military Order, as they would constitute illegal and inhumane treatment in violation of Section 3(b) of that order.

191. Accordingly, Petitioner Barhoumi is entitled to declaratory and injunctive relief, as well as any other relief the court may deem appropriate.

EIGHTEENTH CLAIM FOR RELIEF
**(RESPONDENTS MAY NOT DETAIN BARHOUMI FOR TRIAL BEFORE AN INVALIDLY
CONSTITUTED MILITARY COMMISSION)**

192. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

193. The Commission in this case is invalid and improperly constituted, and the grant of subject matter jurisdiction to the Commission is overbroad and unlawful for at least the following reasons:

A. The Commission lacks jurisdiction because the President lacked congressional authorization to establish the Commission

194. The Supreme Court has noted that "[w]hen the President acts in absence of . . . a congressional grant . . . of authority, he can only rely upon his own independent powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 72 S. Ct. 863, 872 (1952) (Jackson, J. concurring). *See also Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633, 2650 (2004). The Constitution expressly grants Congress the sole power to create military commissions and define offenses to be tried by them. The Constitution vests Congress, not the Executive, with "All legislative powers," with the power "[t]o

define and punish offences against the Law of Nations" and "[t]o constitute Tribunals inferior to the Supreme Court." U.S. Const., Art. I § 8, cl. 9, cl. 10.

195. Congress has not authorized the establishment of military commissions to try individuals captured during the Afghanistan war. Accordingly, Respondents' detention of Barhoumi for trial by the Commission is improper, unlawful and invalid as an *ultra vires* exercise of authority. It exceeds the President's powers under Article II and thus violates the constitutional principles of separation of powers.

196. Barhoumi's status as an Algerian citizen does not confer unlimited power on Respondents to operate outside of the Constitutional framework. The Supreme Court's assertion of jurisdiction for the federal courts in *Rasul* establishes indisputably that aliens held at the base in Guantanamo Bay, no less than American citizens, are entitled to invoke the federal courts' authority under 28 U.S.C. § 2241. *Rasul*, 542 U.S. at ___, 124 S. Ct. at 2696 ("[c]onsidering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship") (footnote omitted). Thus, both Congress and the judiciary possess constitutional authority to check and balance the power of the Executive to act unilaterally. *Rasul*, 542 U.S. at ___, 124 S. Ct. at 2700 (Kennedy, J., concurring).

B. The Appointing Authority lacks power to exercise military authority to appoint a military commission.

197. Because there is no statute expressly stating who can appoint members of a Commission, the power to appoint members of a military commission is based upon the power to convene a general courts-martial. Only the Executive, the Secretary of

Defense (or Secretaries of the other branches of the armed forces) or a commanding officer to whom the Secretary has delegated authority may convene a general court-martial.⁷

198. In this case, the Respondent Secretary Rumsfeld purportedly has delegated authority to Respondent Altenburg to appoint the members of military commissions.

199. Respondent Altenburg is a civilian, not a commissioned officer, and thus lacks the power to exercise military jurisdiction in any form.

200. As a result, the Commission by which the Respondents intend to try Barhoumi is improperly constituted and invalid, such that Barhoumi is entitled to a writ of habeas corpus preventing his unlawful detention and trial before that improper tribunal.

C. The Commission lacks jurisdiction to try individuals at Guantanamo Bay.

201. Military commissions have no jurisdiction to try individuals far from the "locality of actual war." *See Milligan*, 71 U.S. at 127.

202. The Commission that will try Barhoumi is situated far outside any zone of conflict or occupation, and Barhoumi's alleged conduct on which the charges are based did not occur at Guantanamo Bay. As such, the Commission lacks authority to try Barhoumi, and therefore, the Respondents lack the authority to continue to detain Barhoumi for any purported trial at Guantanamo Bay.

⁷ *See* 10 U.S.C. §822.

NINETEENTH CLAIM FOR RELIEF
**(RESPONDENTS MAY NOT DETAIN BARHOUMI FOR OFFENSES THAT HAVE
BEEN CREATED BY THE PRESIDENT AFTER THE FACT)**

203. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

204. Respondent President Bush is attempting to try Barhoumi for crimes that he created long after the alleged "offenses" were committed.

205. The offense of conspiracy stated in the charges against Barhoumi, did not previously exist as an offense. This "offense" was essentially created by the PMO, MCO No. 1, and Military Commission Instruction No. 2, well after Barhoumi's alleged conduct. In essence, the government alleges that Hicks is *criminally* liable for allegedly participating in combat against the United States and its allies. That has never been a criminal offense.

A. The Executive cannot define crimes.

206. Congress, not the Executive, has the authority to legislate under Article I of the Constitution. This expressly includes the power "[t]o define and punish . . . Offences against the Law of Nations." Absent Congressional authorization, the Executive lacks the power to define specific offenses. If he attempts to do so, as he has done here, his actions are *ultra vires* and violate the principles of separation of powers. Accordingly, Barhoumi may not be detained for trial on newly-created offenses established and defined solely by the President.

B. Crimes cannot be defined after the fact.

207. In addition, any charges instituted by the Commission must constitute offenses under the law of war as it existed at the time the alleged conduct was

committed. Applying laws created after the conduct (such as the definition of offenses set forth in MCO No. 2 and the charge of conspiracy which has been made in the Charge against Barhoumi) would violate the *ex post facto* clause of the Constitution (Art. 1, §9, cl. 3) and the principle that a person must have reasonable notice of the bounds of an offense. (Offenses defined to criminalize the conduct of a single person or group of people -- such as those in MCO No. 2 also violate the Constitutional prohibition on bills of attainder.)

208. Since the Charges do not allege any offenses against Barhoumi under the law of war as it existed at the time he allegedly committed these acts, Barhoumi cannot be detained as a result of these Charges. Accordingly, Barhoumi is entitled to a writ of habeas corpus, and Barhoumi should be released immediately.

TWENTIETH CLAIM FOR RELIEF
**(RESPONDENTS MAY NOT DETAIN BARHOUMI FOR TRIAL ON CHARGES OUTSIDE
THE JURISDICTION OF THE MILITARY COMMISSION)**

209. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

210. Barhoumi's confinement is unlawful because he is being detained to face charges before a Commission that is not empowered to hear and/or adjudicate the charges instituted against him. Barhoumi's continued detention purportedly to face trial on the charges leveled against him is unlawful because the charges are outside the parameters established by the Uniform Code of Military Justice (hereinafter "UCMJ"), 10 U.S.C. §801, *et seq.*, the statutory scheme that controls military detentions and that limits the offenses triable by military commissions (even in instances where Congress

has provided any jurisdiction to the military commissions, which it has not with respect to the conflict in Afghanistan).

211. Under the UCMJ, military commissions may not hear and adjudicate any offenses other than those that are recognized by the traditional law of war or those that Congress has expressly authorized them to hear. Here, the offenses charged are not within either of these categories.

212. The purported offense of conspiracy is not a valid offense triable by the Commission under recognized principles of the law of war, the UCMJ or any other statutory authorization. Because civil law countries do not recognize a crime of conspiracy, conspiracy has never been part of the laws of war. No international criminal convention has ever recognized conspiracy to violate the laws of war as a crime. This includes the Geneva Conventions, as well as those setting up the international criminal tribunals in Yugoslavia and Rwanda, as well as the international criminal court. Indeed, the government is making up charges that have been specifically rejected as violations of the laws of war -- including at Nuremburg, for example.

213. As a plurality of the Supreme Court held in *Reid v. Covert*:

[t]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8 [granting Congress the power to "define and punish . . . Offences against the Law of Nations"], and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

354 U.S. 1, 21, 77 S. Ct. 1222, 1233 (1957).

214. Since the charges do not allege any offenses against Barhoumi under the law of war or express statutory authority, the Commission lacks jurisdiction to try and/or punish Barhoumi for those offenses. Accordingly, Barhoumi is entitled to a writ of habeas corpus, and should be released immediately.

TWENTY-FIRST CLAIM FOR RELIEF
(THE MILITARY COMMISSION PROCEDURES VIOLATE BARHOUMI'S RIGHTS UNDER STATUTORY, CONSTITUTIONAL AND INTERNATIONAL LAW)

215. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

216. Even if the Commission had jurisdiction, Barhoumi's detention to stand trial before the Commission still would be unlawful because the Commission's procedures violate applicable principles of statutory, constitutional, and international law.

217. In a series of "Military Commission Orders" (the "MCOs"), issued on March 21, 2002, Respondent Secretary Rumsfeld prescribed the procedural rules of these special military commissions. If Barhoumi is tried according to these proposed procedures, he will receive less protection than he is entitled to under American law, the Constitution, and international law and treaties. The procedures set forth by the MCOs provide Barhoumi with far less protection than those set forth in the UCMJ. The MCOs violate Barhoumi's rights to certain basic procedural safeguards. The MCOs fail to provide Barhoumi an impartial tribunal to adjudicate the charges against him or review those charges. Barhoumi's accusers effectively appoint the "judge and jury" and then review their decision. And during these proceedings themselves, his accusers can

introduce unreliable evidence of the worst sort -- unsworn allegations derived from coerced confessions with no right of confrontation.

218. The absence of procedural protections makes the Commission inadequate as a matter of law.

A. The UCMJ

219. Barhoumi is entitled to the protections of the basic trial rights set forth by Congress in the UCMJ. By its own terms, the UCMJ applies to all persons, including Barhoumi, who are detained within the territory or leased properties of the United States. And the UCMJ prohibits biased tribunals and the use of unreliable evidence of the sort the commissions intend to permit.

B. The Geneva Convention

220. The Geneva Convention requires that prisoners of war ("POW"s), as defined by the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, be treated with the same procedural protections as the soldiers of the country detaining them.⁸ Under Article 5 of the Geneva Convention (III) ("Article 5"), Barhoumi is entitled to be treated as a POW until a competent tribunal has determined otherwise.⁹ As a result, he is entitled to the procedural protections that would apply in a court martial.

221. Even if Barhoumi were not a prisoner of war, any proceeding would still have to meet the requirements of Common Article III of the Geneva Convention and

⁸ Geneva Convention (III) Relative to the Treatment of Prisoners of War: August 12, 1949, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950. The Geneva Convention has also been codified in the UCMJ.

⁹ *See id.* at Art. 5.

Article 75 of Protocol I to the Geneva Conventions. These provide that conviction can only be pronounced by an impartial court respecting generally recognized principles of judicial procedure. Article 75 of Protocol I to the Geneva Conventions specifically provides that no one can be compelled to confess guilt. Barhoumi's long period of interrogations certainly defies the requirements of Article 75. These requirements are not met by the Commission.

C. The Due Process Clause

222. The Constitution's guarantee of due process also guarantees Barhoumi the basic trial rights he will be denied before the Commission. A trial without these basic procedural safeguards lacks the fundamental fairness required in any judicial proceedings -- especially in criminal proceedings that can result in life imprisonment.

223. Since the Commission procedures violate statutory, constitutional, and international law, and in so doing, fail to provide Barhoumi with the basic safeguards necessary to constitute a fundamentally fair criminal proceedings, Barhoumi is entitled to a writ of habeas corpus holding these proceedings to be illegitimate, and should be released immediately.

TWENTY-SECOND CLAIM FOR RELIEF

**(TRIAL BEFORE THE MILITARY COMMISSION VIOLATES BARHOUMI'S RIGHT TO
EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES)**

224. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

A. Barhoumi's detention violates the Equal Protection Clause.

225. Barhoumi is being detained by Respondents under the claimed authority of the PMO and MCO No. 1. These Orders violate Barhoumi's right to equal protection of

the laws of the United States. Under the PMO and MCO No. 1, Barhoumi may be held for trial by the Commission only because of his alienage, since the Orders, by their terms, apply *only* to *non-citizens*.¹⁰ Consequently, thus detention runs afoul of the very purpose of the Equal Protection Clause of the United States Constitution.

226. The Supreme Court has held that any discrimination against aliens not involving governmental employees is subject to strict scrutiny. Here, the government cannot show a compelling governmental reason, advanced through the least restrictive means, for granting *citizens* access to the fundamental protections of civilian justice (including, *inter alia*, indictment, evidentiary rules ensuring reliability and fairness, a system consistent with previously prescribed rules developed by the legislature and enforced by impartial courts, a jury trial presided over by an independent judge not answerable to the prosecutor, and the right to an appeal before a tribunal independent of the prosecuting authority), but affording *non-citizens* a distinctly less protective and inferior brand of adjudication. While the government may have latitude in differentiating between citizens and aliens in areas such as immigration, it has no such latitude with respect to criminal prosecutions.

227. Thus, the blatant and purposeful discriminatory nature and impact of MCO No. 1 violates the Equal Protection clause.

B. Barhoumi's detention violates 42 U.S.C. § 1981.

¹⁰ Military Order of November 13, 2001 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, § 4 (November 13, 2001); Presidential Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (attached as Exhibit 4).

228. Barhoumi's detention for trial by the Commission also violates 42 U.S.C. § 1981.¹¹ That fundamental statutory provision guarantees equal rights for all persons to give evidence, to receive equal benefit of all laws and proceedings for the security of persons, and to receive like punishment. Barhoumi is being unlawfully detained for purposes of trial by the Commission solely because he is a non-citizen. A citizen who committed the very same acts as Barhoumi could not be detained under the PMO and held for trial before the Commission. Accordingly, Barhoumi's detention for trial by the Commission on that discriminatory basis is unlawful.

229. Respondents have detained Barhoumi for trial before the Commission in violation of equal protection of the laws of the United States.

230. Accordingly, Barhoumi is entitled to a writ of habeas corpus, a determination that the Commission proceedings against him are unlawful, and he should be released immediately.

TWENTY-THIRD CLAIM FOR RELIEF
(RESPONDENTS FAIL TO JUSTIFY HOLDING BARHOUMI AS AN ENEMY COMBATANT)

231. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

232. Just as the government has no authority to detain Barhoumi for his alleged violations under a nonexistent version of the law of war, the government has no

¹¹ 42 U.S.C. §1981(a) states in its entirety:

[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

authority to detain Barhoumi as an enemy combatant. Respondents' actions to date in detaining Barhoumi constitute a violation of the process accorded persons seized by the military in times of armed conflict as defined by Geneva Conventions III and IV and customary international law, as well as being inconsistent with the provisions set forth below.

A. Under *Hamdi*, the Due Process Clause requires a neutral tribunal with significant procedural protections to determine whether Barhoumi is an enemy combatant.

233. No tribunal has determined that Barhoumi is an enemy combatant.

234. The CSRT process and procedures that have now been established -- although not yet employed with respect to Barhoumi -- violate due process at least with respect to: (1) the failure to adhere to an appropriate standard of proof; (2) the granting of an appeal to the government of a determination favorable to the detainee; (3) the failure to make an appropriate status determination by limiting the inquiry to consideration only of "enemy combatant" status; (4) the denial of a detainee's right to counsel or other appropriate representation; (5) the denial of a public hearing; (6) the government's power to arbitrarily rescind or change the CSRT process and procedures; and (7) the failure to constitute the CSRT in a manner to assure a neutral decision maker.

B. The Geneva Convention and army regulations require a determination by a fair tribunal.

235. Under Article 5 of the Geneva Convention, Barhoumi is entitled to a "competent tribunal" to determine whether he can be held as an enemy combatant.¹² The same procedural deficiencies that render the CSRT proceedings inadequate for purposes of due process also render the CSRT deficient as a competent tribunal. Army Regulations 190-8 and the Administrative Procedures Act also show these procedures are unlawful as, for example, the burden of proof is not consistent with that established in the regulations.

236. Moreover, it is now too late to establish a competent tribunal. Article 5 of Geneva Convention III, provides that "should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in [Article 4 of the Geneva Convention (III), defining the different categories of belligerents,] such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."¹³

¹² See *id.* at Art. 5.

¹³ *Id.* at Art. 5. Geneva Convention (III) revised the Geneva Convention relative to the Treatment of Prisoner of War of July 27, 1929, which followed the 18 October 1907 Hague Conventions [Relative to the Opening of Hostilities (III), Respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land (IV), and Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (V)], and was enacted concurrent with the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 ["Geneva Convention (I)"], the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 ["Geneva Convention (II)"], Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 ["Geneva Convention (IV)"]. Subsequently, two Protocols Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 8 June 1977, and relating to the Protection of Victims of Non-International. Armed Conflicts ("Protocol II"), 8 June 1977.

237. Respondents have unlawfully detained Barhoumi in violation of their obligation to treat Barhoumi presumptively as a POW, as required by Article 5, and in violation of the procedural requirements of the Third and Fourth Geneva Conventions and customary international law more generally. Thus, the government's failure to accord Petitioner Barhoumi the protections of Article 5 violates the provisions of Geneva Convention (III) as well as the U.S. military regulations promulgated to implement them.¹⁴

¹⁴ In addition, in *Hamdi*, Justice Souter, in his concurring and dissenting opinion (joined by Judge Ginsburg), pointed out that under Respondents' stated position, "the Geneva Convention applies to the Taliban detainees[.]" Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), www.whitehouse.gov/news/releases/2002/02/20020207-13.html (available in Clerk of Court's case file) (hereinafter White House Press Release) (cited in Brief for Respondents 24, n. 9)[.] Hamdi is such a detainee according to the Government's own account, because, under that account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S. T. 3316, 3320, T. I. A. S. No. 3364." 542 U.S. at ___, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*).¹⁴

While ultimately noting that "[w]hether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point[.]" 542 U.S. at ___, 124 S. Ct. at 2658-59, Justice Souter (and Justice Ginsberg) nevertheless stated that "[f]or now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi." 542 U.S. at ___, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*). Justice Souter also expressed his concern that

[b]y holding [Mr. Hamdi] incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. See Brief for Respondents 24; White House Press Release. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5, 6 U.S. T., at 3324.

542 U.S. at ___, 124 S. Ct. at 2657 (Souter, J., *concurring in part and dissenting in part, and concurring in the judgment*). See also *id.* [noting that government's position is "apparently at odds with the [applicable] military regulation," Army Reg. 190-8, §§ 1-5, 1-6 (1997)].

238. Respondents have deliberately contravened the requirement that Barhoumi's status be determined in order to subject Barhoumi to improper and illegal interrogation techniques that violate not only Geneva Convention (III), but also the United States Constitution (Fifth and Sixth Amendments), treaties to which the U.S. is a signatory, and international and common law.

C. The government cannot continue to hold Barhoumi as an enemy combatant because it has not shown that he is one.

239. The government has not come forward with any proof of Barhoumi's combatant status. Under the Constitution, the Geneva Conventions, the International Covenant on Civil and Political Rights, and the American Declaration on the Rights and Duties of Man, Barhoumi cannot be held arbitrarily. Barhoumi is entitled to a judicial determination of his status. In order to hold Barhoumi as an enemy combatant, the government must demonstrate that he is an enemy combatant. If it does this, it still must accord him prisoner of war status. And absent a showing that Barhoumi is an enemy combatant, Barhoumi is entitled to release.

D. The government cannot continue to hold Hicks under its own regulations

240. Indeed, even under the Army's own Regulations 190-8 at 1-6(g), "Persons who have been determined not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed."¹⁵

¹⁵ See Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, § 1-6(g), (1997).

241. By arbitrarily and capriciously detaining Petitioner in custody for over two and a half years while claiming he is not entitled to prisoner of war status, Respondents have acted and continue to act *ultra vires* and in violation of the Administrative Procedures Act, 5 U.S.C. § 706(2). Under the Army's own regulations, Petitioner cannot be held unless he has committed specific acts under which he can be punished. But as we have seen in the Counts on the Commission, the government has not charged Petitioner with any acts that could form a basis to hold him.

E. Under the Alien Tort Claims Act, Respondents Cannot Continue to Detain Petitioner Barhoumi.

242. By arbitrarily holding Petitioner without any justification for doing so and subjecting him to cruel, inhuman or degrading treatment, including torture, Respondents have acted in violation of the law of nations under the Alien Tort Claims Act, 28 U.S.C. § 1350 in that the acts violated customary international law as reflected, expressed, and defined in multilateral treaties and other international instruments, international and domestic judicial decisions, and other authorities.

F. The government cannot continue to hold Hicks as an enemy combatant once hostilities have ended.

243. Under Article 118 of Geneva Convention (III), "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities." *See also Hamdi*, 542 U.S. at ___, 124 S. Ct. at 2640-41. Respondents and their agents have acknowledged that hostilities in Afghanistan have ceased or will soon cease (even if they were ongoing to some extent until shortly before the Supreme Court's decision in *Hamdi*). Indeed, the Chairman of the Joint Chiefs of Staff recently commented with respect to security in Afghanistan, "Security-wise, the *al Qaeda* threat is virtually

nonexistent in the country."¹⁶ Similarly, Respondent Secretary Rumsfeld, in a joint May 1, 2003 press conference with Afghan President Hamid Karzai in Washington, announced that "we're at a point where we clearly have moved from major combat activity to a period of stability and stabilization and reconstruction activities. The bulk of this country today is permissive, it's secure."¹⁷

244. Barhoumi is presumptively a POW entitled to all protections afforded by Geneva Convention (III), including, under Article 118, release after hostilities have ceased.

245. Barhoumi also is entitled to the protection of Common Article 3 of Geneva Convention (III). Article 3(1)(d) prohibits the contracting parties from "passing. . . sentences . . . without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

246. In this case, the prolonged confinement of Barhoumi without charge, and without process to contest his guilt or challenge his detention, amounts to an arbitrary and illegally imposed sentence that is incompatible with fundamental guarantees of due process recognized by all civilized people, in violation of Article 3 of the Geneva Convention (III), and in violation of the due process clause of the Fifth Amendment. Further, Respondents' confinement of Barhoumi is a form of punishment in violation of

¹⁶ See Armed Forces Information Service, *Joint Chiefs Chairman Notes Improvement In Afghanistan* (Aug. 16, 2004), at www.defenselink.mil/news/Aug2004/n08112004_2004081207.html.

¹⁷ See *CNN Rumsfeld: Major combat over in Afghanistan* (May 1, 2003) at <http://www.cnn.com/2003/WORLD/asiapcf/central/05/01/afghan.combat>; See also Armed Forces Information Service, *News Articles*, (May 1, 2003) at http://www.defenselink.mil/news/May2003/n05012003_200305016.html.

the 8th Amendment to the Constitution. Accordingly, Barhoumi is entitled to a writ of habeas corpus and should be released immediately.

TWENTY-FOURTH CLAIM FOR RELIEF

(RESPONDENTS HAVE DENIED BARHOUMI THE RIGHT TO A SPEEDY TRIAL AND THE RIGHT TO BE FREE FROM UNREASONABLE PRE-TRIAL CONFINEMENT)

247. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

A. Barhoumi was entitled to a speedy trial under the UCMJ.

248. The PMO, pursuant to which Barhoumi has been detained for trial, purports to be based, in part, on congressional authorization embodied in selected provisions of the UCMJ. In promulgating the PMO, Respondent President Bush relied, in part, on his authority under 10 U.S.C. §836, which allows the Executive to prescribe rules for military commissions so long as they are not inconsistent with the UCMJ.

249. However, the PMO, and its implementation through MCO No. 1, clearly contravene Article 10 of the UCMJ, 10 U.S.C. §810, which provides that any arrest or confinement of an accused must be terminated unless charges are instituted promptly and made known to the accused, and speedy trial afforded for a determination of guilt on such charges:

[w]hen any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or dismiss the charges and release him.

10 U.S.C. § 810.

250. Barhoumi is a person subject to the UCMJ by virtue of Respondent President Bush's PMO and MCO No. 1, as well as by virtue of Article 2 of the UCMJ, 10 U.S.C. § 802(a)(12), which provides that "persons within an area leased by or

otherwise reserved or acquired for the use of the United States" and under the control of any of the various branches of the military are subject to the UCMJ. Under the Supreme Court's decision in *Rasul*, 542 U.S. at ___, 124 S. Ct. at 2696-98, Guantanamo Bay qualifies under both prongs.

251. The type of delays to which Barhoumi has been subjected are intolerable in the absence of extraordinary or compelling circumstances. Here, the Respondents have not provided any reason whatsoever for their inordinate delays in charging Barhoumi. Since Respondents did not take "immediate steps . . . to inform" Barhoumi "of the specific wrong of which he is accused," they now have a clear and nondiscretionary duty under the UCMJ to "release him" from his confinement.

B. Barhoumi was entitled to a speedy trial under the Geneva Convention.

252. Barhoumi's lengthy pre-trial confinement violates Article 103 of Geneva Convention (III), as well as United States government regulations. Article 103 of Geneva Convention (III) provides that:

[j]udicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible. A prisoner of war shall not be confined while awaiting trial unless a member of the armed forces of the Detaining Power would be so confined if he were accused of a similar offence, or if it is essential to do so in the interests of national security. *In no circumstances shall this confinement exceed three months.*

6 U.S.T. 3316, 3394, 75 U.N.T.S. 135 (emphasis added).

253. In addition, Article 5 of Geneva Convention (III) declares that:

should any doubt arise as to whether persons . . . belong to any of the categories [entitled to protection as a P.O.W. under the Convention], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

254. Likewise, §1-6(a) U.S Army Regulation 190-8, entitled Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, requires that United States military forces abide by the provisions of Article 5 of Geneva Convention (III). Similarly, the Commander's Handbook on the Law of Naval Operations states that "individuals captured as spies or as illegal combatants have the right to assert their claim of entitlement to prisoner-of-war status before a judicial tribunal and to have the question adjudicated." Department of the Navy, NWP 1-14M, The Commander's Handbook on the Law of Naval Operations 11.7 (1995).

255. Respondents are under a clear nondiscretionary duty under Geneva Convention (III), and under the U.S. Army's (and Navy's) own regulations to release Barhoumi because he has been detained in segregation for more than three months – indeed, for several years, substantially longer than the permissible period.

256. Even if Barhoumi were not a presumptive POW, the Geneva Convention would not sanction such delay. The Geneva Convention requires that all civilians and protected persons must be "promptly informed" of the charges and brought to trial "as rapidly as possible." Geneva Convention IV, art. 7. Similarly the fundamental guarantees of Protocol I require that Barhoumi be "informed without delay" of the particulars of charges, and incorporate the International Covenant on Civil and Political Rights.

C. Barhoumi was entitled to a speedy trial under the Sixth Amendment.

257. Moreover, the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions, "the accused shall enjoy the right to a speedy . . .

trial." U.S. Const. amend. VI. Respondents' unlawful detention violates Barhoumi's right to a speedy trial.

258. Respondents have denied Barhoumi his right to a speedy trial as required by American law, the Constitution, and international law and treaty, and Barhoumi therefore is entitled to a writ of habeas corpus and immediate release.

TWENTY-FIFTH CLAIM FOR RELIEF
(THE ABUSE, MISTREATMENT AND RELATED INTERROGATIONS OF BARHOUMI CONSTITUTES SHOCKING AND OFFENSIVE GOVERNMENT CONDUCT DENYING HIM DUE PROCESS)

259. Petitioner incorporates by reference all preceding paragraphs as if set forth fully herein.

260. The charges asserted against Barhoumi cannot properly justify his detention because they are based on unlawfully obtained statements from Barhoumi and other detainees (at Guantanamo Bay and elsewhere). *See* Composite Statement (attached hereto as Exhibit 3). Those statements have been procured via coercive and "aggressive" interrogation techniques and environment that not only violate Barhoumi's Fifth Amendment right to remain silent, his Sixth Amendment right to counsel (with respect to his own statements), and his Eighth Amendment right to be free from cruel and unusual punishment, but also "shock the conscience" and thereby violate Barhoumi's Fifth Amendment Due Process rights (with respect to his own statements as well as those of other detainees). Those techniques also violate Barhoumi's rights under Geneva Convention (III), the CAT, the UCMJ, the ATCA (which prohibits both torture and cruel, inhuman and degrading treatment), Army Regulation 190-8 and the APA, and customary international law. The illegitimacy of basing Barhoumi's prosecution by the

Commission upon statements obtained through coercive interrogation arises not only from the volume and degree of abuse, but also from the fact that statements obtained via coercion and a naked reward/punishment system are simply not reliable¹⁸ – and certainly not sufficiently so to find Barhoumi guilty beyond a reasonable doubt, and imprison him as a result. Article 99 of the Geneva Convention (III) specifically provides that "[n]o moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused."¹⁹ A process that permits such unlawful extraction and use of improperly obtained statements to form the basis of charges or at trial cannot stand. *See, e.g., United States v. Russell*, 411 U.S. 423, 431-32 (1973) (acknowledging that there could exist "a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a

¹⁸ Dissenting in *Padilla*, Justice Stevens cautioned:

[Executive detention] may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

542 U.S. at ___, 124 S. Ct. at 2735 (Stevens, J., *dissenting*).

¹⁹ The National Commission on Terrorist Attacks Upon the United States, 108th Cong., The 9/11 Commission Report 380 (Gov't. Printing Office 2004), at <http://www.9-11commission.gov/report/911/Report.pdf> (hereinafter "the 9/11 Commission"), in its Final Report published last month, recognized the importance of Geneva Convention (III) and international law in the treatment of detainees. In fact, the 9/11 Commission included among its recommendations that:

[t]he United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

Id.

conviction"), *citing [cf.] Rochin v. California*, 342 U.S. 165 (1952). As a result, Barhoumi also is entitled to habeas relief on that basis.

261. Since the abuse, mistreatment and related interrogations of Barhoumi constitutes such shocking and offensive government conduct, Barhoumi has been denied his right to due process. Consequently, the only remedy capable of vindicating Barhoumi's rights is the grant of a writ of habeas corpus, dismissal of the Commission charges against Barhoumi, and an order requiring Barhoumi's release.

SECTION V
PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

1. Designate Jamaal Kiyemba as Next Friend of Barhoumi;
2. Grant the Writ of Habeas Corpus and order Respondents to release Petitioner Barhoumi from his current unlawful detention;
3. Order that Petitioner Barhoumi be brought before the Court or before a Magistrate Judge assigned by the Court to conduct proceedings under the supervision of the Court to vindicate his rights;
4. Order that Petitioner Barhoumi cannot be transferred to any other country without the specific written agreement of Petitioner and Petitioner's counsel while this action is pending;
5. Order that Petitioner Barhoumi cannot be delivered, returned, or rendered to a country where there is a foreseeable and imminent risk that Petitioner will be subject to torture;

6. Order Respondents to allow counsel to meet and confer with Petitioner Barhoumi, in private and unmonitored attorney-client conversations;

7. Order Respondents to cease all interrogations of Petitioner Barhoumi, direct or indirect, while this litigation is pending;

8. Order Respondents to cease all acts of torture and cruel, inhumane and degrading treatment of Petitioner Barhoumi;

9. Order and declare that the Military Order of November 13, 2001 is *ultra vires* and unlawful in violation of Article II of the United States Constitution, the Fifth Amendment to the U.S. Constitution, the Uniform Code of Military Justice, the Administrative Procedures Act, 5 U.S.C. §702, the treaties of the United States and customary international law;

10. Order and declare that the prolonged, indefinite, and restrictive detention of Petitioner Barhoumi without due process is arbitrary and unlawful and a deprivation of liberty without due process in violation of common law principles of due process, the Due Process Clause of the Fifth Amendment to the United States Constitution, the regulations of the United States military, the treaties of the United States, and customary international humanitarian law;

11. Order and declare that continued obligating or expending of funds appropriated under HR 1268 to fund the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay is unlawful, and enjoin Respondents from further obligating or expending funds appropriated under HR 1268 for the construction, maintenance or operation of prisons, camps or other facilities at Guantánamo Bay;

12. Issue an Order declaring unconstitutional and invalid and enjoining any and all Commission proceedings and/or findings against Petitioner Barhoumi;

13. Enter an Order declaring the Combatant Status Review Tribunal unconstitutional and invalid, and enjoin its operation with respect to Petitioner Barhoumi;

14. Issue a writ of mandamus and an Order that orders Respondents not to use the PMO and/or Military Commission Orders and Instructions to detain Barhoumi, or adjudicate charges against Petitioner Barhoumi, or conduct any proceedings related to such charges, because those Orders and instructions violate the U.S. Constitution, U.S. law, and U.S. treaty obligations, both facially and as applied to Petitioner Barhoumi and are therefore *ultra vires* and illegal;

15. After notice and hearing, determine and declare that Petitioner Barhoumi's detention violates the Constitution, laws, treaties, and regulations of the United States; that the PMO is unconstitutional; that Barhoumi has been denied a speedy trial; and that Respondents lack any jurisdiction over Petitioner Barhoumi;

16. After notice and hearing, issue a writ of mandamus that directs Respondents to obey their clear, nondiscretionary duty to follow the Constitution, laws, regulations, and treaties of the United States, and therefore to release Petitioner Barhoumi immediately; and

17. Grant such other relief as the Court may deem necessary and appropriate to protect Petitioner's rights under the common law, the United States Constitution, federal statutory law, and international law.

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Dated this 13th day of December, 2005

Respectfully submitted,

Counsel for Petitioners:

/s/ Mona L. Burton

Mona L. Burton (Utah State Bar #5399)
Robert G. Wing (Utah State Bar #4445)
James R. Farmer (Utah State Bar #8592)
Amy Poulson (Utah State Bar #9378)
Scott S. Barker (Colorado State Bar # 11177)
J. Triplett Mackintosh (Colorado State Bar
#22359)
Rick D. Bailey (Colorado State Bar # 26554)
Hamid M. Khan (Colorado State Bar #34139)
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111
Tel: (801) 595-7800

Of Counsel

Barbara J. Olshansky (New York State Bar
#3635)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
Telephone: (212) 614-6439

CERTIFICATION OF REPRESENTATION WITHOUT COMPENSATION

Counsel for Petitioner certify, pursuant to L. Cv. R. 83.2(g), that they are representing Petitioner without compensation, and further pursuant to L. Cv. R. 83.2(j), that they have personal familiarity with the Local Rules of this Court.

Dated this 13th day of December, 2005.

/s/ Mona L. Burton

Mona L. Burton
Robert G. Wing
James R. Farmer
Amy Poulson
J. Triplett Mackintosh
Hamid M. Khan
HOLLAND & HART LLP
60 East South Temple, Suite 2000
Salt Lake City, UT 84111
Tel: (801) 595-7800

Of Counsel
Barbara J. Olshansky
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway
New York, New York 10012
Telephone: (212) 614-6439

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EXHIBIT A

UNITED STATES OF AMERICA

v.

SUFYLAN BARHOUMI

a/k/a Abu Obaida

a/k/a Ubaydah Al Jaza'iri

a/k/a Shafiq

CHARGE:

CONSPIRACY

JURISDICTION

1. Jurisdiction for this Military Commission is based on the President's determination of July 6, 2004 that Sufyan Barhoumi (a/k/a Abu Obaida a/k/a Ubaydah Al Jaza'iri a/k/a/ Shafiq hereinafter "Barhoumi") is subject to his Military Order of November 13, 2001.
2. The charged conduct alleged against Barhoumi is triable by a military commission.

GENERAL ALLEGATIONS

3. Al Qaida ("the Base"), was founded by Usama bin Laden and others in or about 1989 for the purpose of opposing certain governments and officials with force and violence.
4. Usama bin Laden is recognized as the *emir* (prince or leader) of al Qaida.
5. A purpose or goal of al Qaida, as stated by Usama bin Laden and other al Qaida leaders, is to support violent attacks against property and nationals (both military and civilian) of the United States and other countries for the purpose of, *inter alia*, forcing the United States to withdraw its forces from the Arabian Peninsula and in retaliation for U.S. support of Israel.
6. Al Qaida operations and activities are directed by a *shura* (consultation) council composed of committees, including: political committee; military committee; security committee; finance committee; media committee; and religious/legal committee.
7. Between 1989 and 2001, al Qaida established training camps, guest houses, and business operations in Afghanistan, Pakistan, and other countries for the purpose of training and supporting violent attacks against property and nationals (both military and civilian) of the United States and other countries.
8. In 1992 and 1993, al Qaida supported violent opposition of US. property and nationals by, among other things, transporting personnel, weapons, explosives, and ammunition to Yemen, Saudi Arabia, Somalia, and other countries.

9. In August 1996, Usama bin Laden issued a public "*Declaration of Jihad Against the Americans*," in which he called for the murder of U.S. military personnel serving on the Arabian peninsula.
10. In February 1998, Usama bin Laden, Ayman al Zawahiri, and others, under the banner of "International Islamic Front for Fighting Jews and Crusaders," issued a *fatwa* (purported religious ruling) requiring all Muslims able to do so to kill Americans – whether civilian or military – anywhere they can be found and to "plunder their money."
11. On or about May 29, 1998, Usama bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the "International Islamic Front for Fighting Jews and Crusaders," in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."
12. Since 1989 members and associates of al Qaida, known and unknown, have carried out numerous terrorist attacks, including, but not limited to: the attacks against the American Embassies in Kenya and Tanzania in August 1998; the attack against the *USS COLE* in October 2000; and the attacks on the United States on September 11, 2001.

CHARGE: CONSPIRACY

13. Sufyian Barhoumi, Jabran Said bin al Qahtani, and Ghassan al Sharbi in the United States, Afghanistan, Pakistan, and other countries, from on or about January 1996 to on or about March 2002, willfully and knowingly joined an enterprise of persons who shared a common criminal purpose and conspired and agreed with Usama bin Laden (a/k/a Abu Abdullah), Saif al Adel, Dr. Ayman al Zawahiri (a/k/a "the Doctor"), Muhammad Atef (a/k/a Abu Hafs al Masri), Zayn al Abidin Muhammad Husayn (a/k/a/ Abu Zubayda, hereinafter "Abu Zubayda"), Binyam Muhammad, Noor al Deen, Akrama al Sudani and other members and associates of the al Qaida organization, known and unknown, to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.
14. In furtherance of this enterprise and conspiracy, al Sharbi, Barhoumi, al Qahtani, Abu Zubayda, Binyam Muhammad, Noor al Deen, Akrama al Sudani, and other members or associates of al Qaida committed the following overt acts:
 - a. In 1998 Barhoumi, an Algerian-citizen, attended the electronics and explosives course at Khalden Camp in Afghanistan, an al Qaida-affiliated training camp, where he received training in constructing and dismantling electronically-controlled explosives.

- b. After completing his training, Barhoumi became an explosives trainer for al Qaida, training members of al Qaida on electronically-controlled explosives at remote locations.
- c. In or about August 2000, al Sharbi, a Saudi citizen and Electrical engineering graduate of Embry Riddle University, in Prescott, Arizona, departed the United States in search of terrorist training in Afghanistan.
- d. In July 2001, Muhammad Atef (a/k/a/ Abu Hafs al Masri), the head of al Qaida's military committee and al Qaida's military commander, wrote a letter to Abu Muhammad, the *emir* of al Qaida's al Farouq Camp, asking him to select two "brothers" from the camp to receive electronically-controlled explosives training in Pakistan, for the purpose of establishing a new and independent section of the military committee.
- e. In July 2001, al Sharbi attended the al Qaida-run al Farouq training camp, where he was first introduced to Usama bin Laden. At al Farouq, al Sharbi's training included, *inter alia*, physical training, military tactics, weapons instruction, and firing on a variety of individual and crew-served weapons.
- f. During July and August 2001, al Sharbi stood watch with loaded weapons at al Farouq at times when Usama bin Laden visited the camp.
- g. From July 2001 to September 13, 2001, al Sharbi provided English translation for another camp attendee's military training at al Farouq, to include translating the attendee's personal *bayat* ("oath of allegiance") to Usama bin Laden.
- h. On or about September 13, 2001, anticipating a military response to al Qaida's attacks on the United States of September 11, 2001, al Sharbi and the remaining trainees were ordered to evacuate al Farouq. Al Sharbi and others fled the camp and were told to fire warning shots in the air if they saw American missiles approaching.
- i. Shortly after the September 11 2001 attacks on the United States, al Qahtani, a Saudi citizen and Electrical engineering graduate of King Saud University in Saudi Arabia, left Saudi Arabia with the intent to fight against the Northern Alliance and American Forces, whom he expected would soon be fighting in Afghanistan.
- j. In October 2001, al Qahtani attended a newly established terrorist training camp north of Kabul, where he received physical conditioning, and training in the PK Machine gun and AK-47 assault rifle.

- k. Between late December 2001 and the end of February 2002, Abu Zubayda, a high-ranking al Qaida recruiter and operational planner, assisted in moving al Sharbi, al Qahtani and Binyam Muhammad from Birmel, Afghanistan to a guest house in Faisalabad, Pakistan where they would obtain further training.
- l. By early March 2002, Abu Zubayda, Barhoumi, al Sharbi, al Qahtani, and Binyam Muhammad had all arrived at the guest house in Faisalabad, Pakistan. Barhoumi was to train al Sharbi, al Qahtani and Binyam Muhammad in building small, hand-held remote-detonation devices for explosives that would later be used in Afghanistan against United States forces.
- m. In March 2002, after Barhoumi, al Sharbi and al Qahtani had all arrived at the guest house, Abu Zubayda provided approximately \$1,000 U.S. Dollars for the purchase of components to be used for training al Sharbi and al Qahtani in making remote-detonation devices.
- n. Shortly after receiving the money for the components, Barhoumi, Noor al Deen and other individuals staying at the house went into downtown Faisalabad with a five page list of electrical equipment and devices for purchase which included, *inter alia*, electrical resistors, plastic resistors, light bulbs for circuit board lights, plastic and ceramic diodes, circuit testing boards, an ohmmeter, watches, soldering wire, soldering guns, wire and coil, six cell phones of a specified model, transformers and an electronics manual.
- o. After purchasing the necessary components, al Qahtani and al Sharbi received training from Barhoumi on how to build hand-held remote-detonation devices for explosives while at the guest house.
- p. During March 2002, after his initial training, al Qahtani was given the mission of constructing as many circuit boards as possible with the intent to ship them to Afghanistan to be used as timing devices in bombs.
- q. After their training was completed and a sufficient number of circuit boards were built, Abu Zubayda had directed that al Qahtani and al Sharbi were to return to Afghanistan in order to use, and to train others to construct remote-control devices to detonate car bombs against United States forces.
- r. During March 2002 al Qahtani wrote two instructional manuals on assembling circuit boards that could be used as timing devices for bombs and other improvised explosive devices.

15. On March 28, 2002, Barhoumi, al Sharbi, al Qahtani, Abu Zubayda and others were captured in a safe house in Faisalabad after authorities raided the home.